Supreme Court of the United States

OCTOBER TERM, 1960

No. 567

DEAN RUSK, SECRETARY OF STATE,
APPELLANT,

vs.

JOSEPH HENRY CORT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 868-60

JOSEPH HENRY CORT, Praha 15, Na Sypcine 3, Prague, Czechoslovakia, PLAINTIFF

v.

CHRISTIAN A. HERTER, Secretary of State, Department of State, Washington, D. C., DEFENDANT

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF—Filed March 23, 1960

The plaintiff, Joseph Henry Cort, complaining of the defendant, Christian A. Herter, Secretary of State, by his attorneys, alleges:

1. The Court has jurisdiction of this action under D. C. Code, sections 11-305 and 11-306; 28 U. S. Code, sections 1331 and 2201; and section 10 of the Administrative Procedure Act, 5 U. S. Code, section 1009. One of the purposes of this action is to enjoin the enforcement and execution of certain acts of Congress for repugnance to the Constitution. Hence a three-judge court is required to be convened under 28 U. S. Code, sections 2282 and 2284.

2. The plaintiff is a citizen of the United States having been born in Boston, Massachusetts on December 27, 1927. He has not transferred his allegiance to or become a citizen or national of any other country.

[fol. 2] 3. The plaintiff is a physician and research physiologist. He presently resides with his wife and their two infant children, all American citizens, in Prague, Czechoslovakia where he is employed at the Institute for Cardiovascular Research.

4. The defendant, Christian A. Herter, is Secretary of State of the United States and has his office in the District of Columbia.

5. On June 1, 1948 the plaintiff was issued a United States passport which was renewed on May 19, 1950 for a period of two years.

6. On May 29, 1951 the plaintiff departed from the United States for the sole purpose of carrying out the terms of a Fellowship given by the National Foundation for Infantile Paralysis, Inc., an American corporation, for work to be performed by the plaintiff at the Department of Experimental Medicine, University of Cambridge, England.

7. Prior to the said departure the plaintiff had registered on May 25, 1951 under and prior to the effective date of the Doctors Draft Act (64 Stat. 826, 50 App. U.S.C. §§ 454 *et seq.*) after having been advised by the New Haven Draft Board and by the Yale University Advisor for the Draft that he could take up the said position in Cambridge, England.

8. The plaintiff assumed his duties at the University of Cambridge where he was employed from 1951 to 1953; thereafter from 1953 to 1954 he was employed at the Medical School of the University of Birmingham, Birmingham, England.

9. Shortly after his arrival in England, namely, on [fol. 3] November 28, 1951 and on several occasions thereafter, the American Embassy in London, upon instructions of the Department of State, demanded that the plaintiff surrender his passport and return immediately to the United States. The said demand by the Department of State was made pursuant to departmental policies subsequently embodied in regulations, which regulations were declared invalid as unauthorized by law by the United States Supreme Court on June 16, 1958 in *Kent & Briehl* v. *Dulles*, 357 U. S. 116.

10. On or about September 14, 1953 a Draft Board in Brookline, Massachusetts ordered plaintiff to report for induction into the armed forces of the United States. Plaintiff did not appear for induction and was subsequently indicted on December 17, 1954 by a grand jury in the United States District Court for the District of Massachusetts on the charge of having failed to comply with the said order.

11. Plaintiff believed and the facts were that the induction order was not issued in good faith to secure his military services, that his past political associations and present physical disabilities made him ineligible for such service, and that he was being ordered to report back to the United States to be served with a Congressional committee subpoena or indicted under the Smith Act (54 Stat. 670, 18 U.S.C. § 2385).

12. Plaintiff had departed from the United States for the reason set forth in paragraph 6 above and he remained abroad for the reasons set forth in paragraph 6 and 8 above. He did not depart from or remain outside the [fol. 4] United States for the purpose of evading or avoiding training and service in the military, air or naval forces of the United States.

13. Contemporaneously with and subsequent to the said order to report for induction, the United States sought of Great Britain the plaintiff's expulsion and deportation to the United States. Accordingly, the British Government refused to review the plaintiff's English residence permit. He thereupon traveled with his family to Czechoslovakia where he was and is employed doing research in physiology at the Institute for Cardiovascular Research, as set forth above.

14. On or about April 7, 1959 the plaintiff applied at Prague for the issuance of a passport in order to return to the United States with his wife and children so that he might fulfill his obligations under the Selective Service laws and his wife might secure medical treatment for multiple sclerosis.

15. In connection with his application for a passport the plaintiff stated the facts with respect to his residence abroad recited above and the American Consul in Prague certified that

> "Without evidence to the contrary, the Consular officer has no reason to doubt Dr. Cort's statements made in the attached affidavit which purports to answer the charge that he departed from and remained outside the jurisdiction of the United States for the purpose of evading or avoiding training and service in the Armed Forces of the United States."

16. On October 15, 1959 the Passport Office of the Department of State made an administrative decision that [fol. 5] plaintiff had expatriated himself under the provisions of § 349 (a)(10) of the Immigration & Nationality Act of 1952 [8 U.S.C. § 1481 (a)(10)] herein called the Act, and denied the plaintiff's application for a passport.

17. On February 10, 1960 the Department's Board of Review on the Loss of Nationality affirmed the said decision of the Passport Office.

18. Said decisions were made without any evidence that the plaintiff had departed from the United States or remained abroad for the purpose of avoiding his obligations under the Selective Service laws; they were made despite plaintiff's affidavits under oath to the contrary; they were made in the face of a decision of the United States District Court for the Southern District of California that the said statutory provisions were unconstitutional. *Mendoza-Martinez* v. *Mackey* (S.D. Calif., No. 1314-ND), appeal pending *sub nom Mackey* v. *Mendoza-Martinez*, Oct. Term, 1958, No. 649.

19. The defendant's action is unlawful in that:

(a) There is no evidence whatsoever that the plaintiff's departure from or remaining outside the United States was for the purpose of avoiding his military obligations.

(b) The statutory provision of the Act, § 349(a)(10), that failure to comply with any provision of the compulsory service laws shall raise a presumption that the departure from or absence from the United States was for the purpose of avoiding military obligations.

[fol. 6] (i) is inapplicable in the absence of a judicial finding resulting from a criminal conviction for avoidance of military service obligations.

(ii) is unreasonable, arbitrary and invalid, and

(iii) is overcome by the plaintiff's sworn statements as to his reasons for departing from the United States and for remaining abroad.

(c) The Act is unconstitutional in that:

(i) it is not a reasonable or proper exercise of the foreign affairs, war, or other powers of the Congress;

(ii) under the Fifth Amendment and otherwise, a native-born citizen may not constitutionally be deprived of his American nationality against his will;

(iii) the resulting deprivation is so severe as to contravene the Eighth Amendment's protection of persons against cruel and unusual punishment; and

(iv) the Congressional attempt to exercise a power reserved to the people and not delegated to the United States by the Constitution violates the Ninth and Tenth Amendments.

20. The plaintiff has exhausted his administrative remedies.

21. The defendant's actions in denying the plaintiff the [fol. 7] passport facilities sought and in decreeing plaintiff's loss of nationality, and hence statelessness, have caused plaintiff irreparable injury for which he has no adequate remedy at law.

Wherefore, plaintiff demands judgment

(1) enjoining the defendant, his successors and subordinates, from carrying out or enforcing the provisions of § 349 (a)(10) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1481 (a)(10), as being unconstitutional, and from denying plaintiff any of the rights and privileges of a citizen of the United States, and from withholding from the plaintiff a United States passport;

(2) ordering the revocation and nullification of the certificate of loss of nationality heretofore issued to the plaintiff;

(3) ordering that the defendant issue to the plaintiff a valid United States passport of standard form and duration;

(4) declaring that the plaintiff is a citizen of the United States and is entitled to all of the rights and privileges of a citizen of the United States; and

(5) granting such other and further relief as may be just and proper in the premises.

Rabinowitz & Boudin
25 Broad Street
New York 4, N. Y.

By

/s/ Leonard B. Boudin

Forer and Reis
711 - 14th Street N. W.
Washington, D. C.

By

/s/ David Rein

Attorneys for Plaintiff

[fol. 8] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT Filed April 20, 1960

Now comes the plaintiff by his attorneys and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Rule 9 of the Local Civil Rules of this Court, moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact, and the plaintiff is entitled to judgment as a matter of law.

In support of this motion, plaintiff refers to the entire record herein including the complaint, transcript of proceedings before the Board of Review on the Loss of Nationality, affidavit of the plaintiff sworn to the 5th day of April, 1960, and plaintiff's Statement Under Rule 9 of the Local Civil Rules of this Court dated April 20, 1960.

/s/ Leonard Boudin
RABINOWITZ & BOUDIN
25 Broad Street
New York 4, N. Y.

/s/ David Rein
FORER & REIN
711 - 14th Street N.W.
Washington, D. C.

Attorneys for Plaintiff

[fol. 9] Acknowledgment of service

[omitted in printing]

[fol. 10] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

STATEMENT UNDER RULE 9 OF THE LOCAL CIVIL RULES OF THIS COURT—Filed April 26, 1960

The following are the material facts as to which the plaintiff contends there is no genuine issue:

1. Plaintiff was born in the United States on December 27, 1927 and thereupon became an American citizen by birth.

2. The details of plaintiff's marriage and the birth of his children are set forth in paragraph 3 of his affidavit of April 5, 1960 (herein referred to as the Affidavit).

3. Plaintiff's educational background, employment and writings are set forth in paragraph 4 of the Affidavit and in Exhibit A attached thereto.

4. Plaintiff has repeatedly stated under oath that he did not depart from the United States or remain abroad for the purpose of avoiding his military service obligations.

5. There is no evidence to rebut these statements under oath. The American Consul in Prague certified on August [fol. 11] 24, 1959 that he had no such evidence or any reason to doubt plaintiff's statements in his affidavit of August 24, 1959. No such evidence was offered in the administrative proceedings in the Passport Office or in the hearing before the Board of Nationality Review. Instead of evidence the defendant relies exclusively upon the statutory presumption in § 349 (a) (10) of the Immigration and Nationality Act of 1952 (herein called the Act).

6. Plaintiff went abroad and remained abroad for the professional reasons set forth in paragraphs 12, 13 and 22 of his Affidavit.

7. There is no evidence in defendant's possession to rebut the statement made in paragraph 6 above.

8. Plaintiff duly registered under the Selective Service Laws and was told officially that he could depart for England in 1951, as more particularly set forth in paragraph 12 of the Affidavit.

9. Plaintiff's physical and political disabilities were such that he would not have been accepted by the Army, as appears more particularly in paragraphs 10 and 12 of the Affidavit.

10. In 1953 and 1954 plaintiff believed the facts set forth in paragraph 9 above.

11. In 1959 General Lewis Hershey, Director of the Selective Service System, confirmed the accuracy of this belief, as more particularly appears in paragraph 27 of the Affidavit.

12. In 1953 plaintiff had been illegally deprived of his passport by the United States Department of State, as more particularly appears in paragraphs 14, 15 and 16 of his Affidavit.

[fol. 12] 13. By reason of paragraph 12 above, plaintiff could not lawfully have departed from Great Britain in 1953 and could not lawfully have entered the United States.

14. In 1953 the House Committee on Un-American Activities had inquired concerning and had given notoriety to plaintiff's political activities, as is more particularly set forth in paragraph 18 of the Affidavit.

15. Plaintiff did not return to the United States because he feared political persecution, as more particularly appears in paragraph 19 of his Affidavit.

16. Plaintiff was advised by counsel and believed, as appears in paragraph 20 of his Affidavit, that he was not legally required to report to United States Selective Service Board notices which were transmitted to him on British soil.

17. Plaintiff sought employment in India, Israel and elsewhere in 1954 when the British Government terminated his residence permit.

18. Plaintiff was offered employment in Czechoslovakia, as appears in paragraph 21 of his Affidavit, and accepted such employment.

19. Plaintiff, as more particularly appears from paragraph 22 of his Affidavit, did not engage in any conduct

indicating a withdrawal of allegiance from the United States or a transfer of allegiance to Czechoslovakia or any other country.

20. Plaintiff has retained his ties to the United States, as appears more particularly in paragraphs 3, 23 and 34 of the Affidavit.

[fol. 13] 21. Plaintiff's children are registered in the American Embassy at Prague as American citizens.

22. Plaintiff has sought since 1950 to comply with his obligations under the Selective Service Laws, as appears more particularly in paragraphs 24-38 of the Affidavit.

23. Plaintiff applied on April 7, 1959 at the American Consulate in Prague for a passport to come to the United States with his family. He executed the application annexed as Exhibit Z to the Affidavit.

24. In support of the application plaintiff also executed affidavits and statements as follows:

Affidavit of August 24, 1959—Exhibit Z of the Affidavit

Affidavit and Supplementary Explanatory Statement of August 24, 1959—Exhibit Z of the Affidavit

Statement of November 2, 1959—Exhibit EE of the Affidavit

25. Plaintiff has been denied a passport by the defendant on the ground that he expatriated himself under 349 (a) (10) of the Act.

26. No court has ever made a decision in a criminal proceeding or otherwise that plaintiff remained abroad for the purposes prohibited by the said statutory provision.

27. Although plaintiff was indicted, as appears in paragraph 47 of the Affidavit, plaintiff has not been tried under the said indictment.

28. Plaintiff executed and filed the Application for Appointment as a Commissioned Officer in the United States Public Health Service attached as Exhibit A to the Affidavit.

29. The letters, telegrams, statements and other papers attached as Exhibits A-EE are true copies of the originals

[fol. 14] 30. The statements made by or on behalf of plaintiff in the papers referred to in paragraph 29 above are true.

31. The defendant has no evidence in its possession to rebut the statements made by or on behalf of plaintiff and referred to in paragraph 30 above.

32. No evidence was presented by the Government or otherwise in the Passport Office or before the Board of Nationality Review which cast doubt upon the truth of the statements of fact made in plaintiff's Affidavit, plaintiff's complaint, or the exhibits attached to the said Affidavit.

33. The defendant, CHRISTIAN A. HERTER, is Secretary of State of the United States and has his office in the District of Columbia.

34. The statements of fact set forth in the allegations of the complaint, paragraphs 2 through 18, are true.

35. The allegations of fact are set forth in paragraphs 1 through 38 of the complaint are accurate.

Dated, April 20, 1960.

s Leonard B. Boudin
Rabinowitz & Boudin
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New York 4, N. Y.

s David Rein
Forer and Rein
711 - 14th Street N.W.
Washington, D. C.
Attorneys for Plaintiff

[fol. 15] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

REQUEST FOR A THREE-JUDGE COURT—Filed April 26, 1960

Comes now the plaintiff in the above entitled cause and upon the complaint herein and the motions for a preliminary injunction and summary judgment and the attached affidavit of the plaintiff suggests to the Court the necessity of convening a three-judge court in conformity with 28 U. S. Code, sections 2282 and 2284, for the reason that plaintiff seeks to restrain the enforcement and execution of an Act of Congress, namely, section 349 (a) (10) of the Immigration and Nationality Act of 1952, 8 U. S. Code, 1481 (a) (10), for repugnance to the Constitution of the United States.

/s/ Leonard B. Boudin
RABINOWITZ & BOUDIN
25 Broad Street
New York 4, N. Y.

/s/ David Rein
FORER AND REIN
711 - 14th Street N. W.
Washington, D. C.
Attorneys for Plaintiff

[fol. 16] Acknowledgement of service

(omitted in printing)

[fol. 17] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OPPOSITION TO PLAINTIFF'S REQUEST FOR A THREE-JUDGE COURT AND DEFENDANT'S REQUEST FOR HEARING THEREON
Filed May 2, 1960

Comes now defendant by his attorney, the United States Attorney, and opposes plaintiff's request for a three-judge court pursuant to 28 USC §§ 2282 and 2284 and, further, requests a hearing thereon, preferably at the same time as defendant's pending Motion To Dismiss is heard.

Defendant opposes the request on the following grounds: First, the Court is without jurisdiction to entertain this suit and thus the complaint is subject to dismissal at the outset by the single District Judge to whom the case is first assigned. In support of this ground, defendant hereby incorporates herein by reference his Motion to Dismiss, together with the supporting memorandum of points and authorities, which is now awaiting consideration and determination.

Second, if the Court has jurisdiction to entertain this suit, plaintiff has failed to present a substantial constitutional question as might warrant the convening of a three-judge court. Defendant believes that plaintiff's contentions to the contrary are not supported by the authorities upon which he relies in his recently filed Motion For Summary Judgment.

For the Court's information, defendant intends to oppose plaintiff's Motion For Summary Judgment and to

file a cross-motion if the Court denies his Motion To Dismiss or grants plaintiff's application.

/s/ Oliver Gasch
United States Attorney

[fol. 18]

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ John F. Doyle
Assistant United States Attorney

/s/ Harold D. Rhynedance, Jr.
Assistant United States Attorney

Certificate of Service (omitted in printing)

[fol. 19] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 324-60

ANGELIKA L. SCHNEIDER, PLAINTIFF

v.

CHRISTIAN A. HERTER, DEFENDANT

Civil Action No. 777-60

ANNE d'ARBELOFF GUÉRRIERI, PLAINTIFF

v.

CHRISTIAN A. HERTER, DEFENDANT

Civil Action No. 868-60

JOSEPH HENRY CORT, PLAINTIFF

v.

CHRISTIAN A. HERTER, DEFENDANT

MOTION TO CONSOLIDATE—Filed May 2, 1960

Comes now defendant in each of the above-captioned actions by his attorney, the United States Attorney, and moves to consolidate the aforesaid actions for hearing, consideration and disposition of (1) the jurisdictional grounds asserted by defendant in the above-captioned actions, and (2) the constitutional grounds asserted by the respective plaintiffs in the above-captioned actions, unless such actions are sooner dismissed on jurisdictional grounds. As reasons for the requested consolidation, defendant states that the above-captioned actions involve

certain common questions of law, as reflected by the attached Memorandum Of Points And Authorities In Support Of Defendant's Motion To Consolidate.

/s/ Oliver Gasch
United States Attorney

[fol. 20]

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ John F. Doyle
Assistant United States Attorney

/s/ Harold D. Rhynedance, Jr.
Assistant United States Attorney

Certificate of Service (omitted in printing)

[fol. 21] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO DISMISS—Filed May 2, 1960

Comes now defendant by his attorney, the United States Attorney, and moves to dismiss the complaint on one or more of the following grounds: (1) The Court lacks jurisdiction over the person of the plaintiff; (2) The Court lacks jurisdiction over the subject matter; and (3) The plaintiff has failed to exhaust the administrative remedies afforded by Section 360 of the Immigration and Nationality Act of 1952.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ John F. Doyle
Assistant United States Attorney

/s/ Harold D. Rhynedance, Jr.
Assistant United States Attorney

Certificate of Service (omitted in printing)

[fol. 22] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER DENYING MOTIONS TO DISMISS AND TO CONSOLIDATE—
July 13, 1960.

This cause having been heard on defendant's motions to dismiss and to consolidate this cause with the cases of *Schneider v. Herter*, C. A. No. 324-60, and *Guerrieri v. Herter*, C. A. No. 777-60, and the Court having considered the entire record and Memoranda of Points and Authorities filed herein and having heard argument in open court, it is by the Court, this 13th day of July, 1960

ORDERED, that defendant's motions to dismiss and to consolidate this cause be and they hereby are denied.

/s/ Burnita Shelton Matthews
District Judge

No objection as to form

/s/ John F. Doyle
Assistant U.S. Attorney

[fol. 23] IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER Filed July 22, 1960

In answer to the complaint defendant, by and through his attorney the United States Attorney, states as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint defendant avers as follows:

1. Defendant is not required to answer the allegations contained in paragraph 1 of the complaint.

2. Defendant denies that plaintiff is a citizen of the United States, but further answering admits that plaintiff was born in Boston, Massachusetts on December 27, 1927. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2 of the complaint.

3. Defendant admits that plaintiff possesses the degree [fol. 24] of medical doctor and that his wife and children are citizens of the United States. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 3 of the complaint.

4. Defendant admits the allegations contained in paragraph 4 of the complaint.

5. Defendant admits the allegations contained in paragraph 5 of the complaint, except that defendant avers that plaintiff's passport was renewed on June 19, 1950, not May 19, 1950.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint.

7. Defendant admits that plaintiff was registered as a "special registrant" on May 25, 1951, under the provisions of the Doctor's Draft Law in addition to his "regular" registration under the Universal Training and Service Act of 1948 on July 5, 1949. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7 of the complaint.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint.

9. Defendant admits the allegations contained in paragraph 9 of the complaint.

10. Defendant admits the allegations contained in para-
[fol. 25] graph 10 of the complaint.

11. Defendant denies the allegations contained in paragraph 11 of the complaint.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 12 of the complaint. Defendant denies the remaining allegations contained in paragraph 12 of the complaint.

13. Defendant denies the allegations contained in paragraph 13 of the complaint, except that defendant admits that plaintiff took up residence in Czechslovakia on August 8, 1954. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiff's employment.

14. Defendant admits that plaintiff executed an application for a passport at the United States Embassy in Prague, Czechoslovakia on April 7, 1959. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 14 of the complaint.

15. Defendant denies the allegations contained in paragraph 15 of the complaint, except that defendant admits that the comment quoted appeared on the reverse of plaintiff's Affidavit to Explain Protracted Foreign Residence.

16. Defendant admits the allegations contained in paragraph 16 of the complaint.

17. Defendant admits the allegations contained in paragraph 17 of the complaint, except that the affirmance [fol. 26] occurred on December 8, 1959, and was communicated to plaintiff in a communication dated February 10, 1960.

18. Defendant denies the allegations contained in paragraph 18 of the complaint.

19. Defendant denies the allegations contained in paragraph 19 of the complaint.

19 (a). Defendant denies the allegations contained in paragraph 19 (a) of the complaint.

19 (b)(i). Defendant denies the allegations contained in paragraph 19 (b)(i) of the complaint.

19 (b)(ii). Defendant denies the allegations contained in paragraph 19 (b)(ii) of the complaint.

19 (b)(iii). Defendant denies the allegations contained in paragraph 19 (b)(iii) of the complaint.

19 (c). Defendant denies the allegations contained in paragraph 19 (c) of the complaint.

19 (c)(i). Defendant denies the allegations contained in paragraph 19 (c)(i) of the complaint.

19 (c)(ii). Defendant denies the allegations contained in paragraph 19 (c)(ii) of the complaint.

19 (c)(iii). Defendant denies the allegations contained in paragraph 19(c)(iii) of the complaint.

19 (c)(iv). Defendant denies the allegations contained in paragraph 19 (c)(iv) of the complaint.

20. Defendant denies the allegations contained in paragraph 20 of the complaint.

21. Defendant denies the allegations contained in paragraph 21 of the complaint.

[fol. 27]

Third Defense

This Court lacks jurisdiction over the subject matter of the complaint.

Fourth Defense

Plaintiff's failure to exhaust the exclusive remedy provided by Congress deprives this Court of jurisdiction.

Fifth Defense.

The complaint fails to raise a substantial constitutional question.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ John F. Doyle
Assistant United States Attorney

/s/ Robert J. Asman
Assistant United States Attorney

Certificate of Service (omitted in printing)

[fol. 28] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AMENDED ANSWER—Filed Aug. 15, 1960

In making this amended answer to the complaint defendant, by and through his attorney the United States Attorney, states as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint defendant avers as follows:

1. Defendant is not required to answer the allegations contained in paragraph 1 of the complaint.

2. Defendant denies that plaintiff is a citizen of the United States, but further answering admits that plaintiff was born in Boston, Massachusetts on December 27, 1927. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2 of the complaint.

3. Defendant admits that plaintiff possesses the degree of medical doctor and that his wife and children are citizens of the United States. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 3 of the complaint.

4. Defendant admits the allegations contained in paragraph 4 of the complaint.

[fol. 29] 5. Defendant admits the allegations contained in paragraph 5 of the complaint, except that defendant avers that plaintiff's passport was renewed on June 19, 1950, not May 19, 1950.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint.

7. Defendant admits that plaintiff was registered as a "special registrant" on May 25, 1951, under the provisions of the Doctor's Draft Law in addition to his "regular" registration under the Universal Training and Service Act of 1948 on July 5, 1949. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7 of the complaint.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint.

9. Defendant admits the allegations contained in paragraph 9 of the complaint.

10. Defendant admits the allegations contained in paragraph 10 of the complaint.

11. Defendant denies the allegations contained in paragraph 11 of the complaint.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 12 of the complaint.

13. Defendant denies the allegations contained in paragraph 13 of the complaint, except that defendant admits that plaintiff took up residence in Czechoslovakia on August 8, 1954. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiff's employment.

14. Defendant admits that plaintiff executed an application for a passport at the United States Embassy in Prague, Czechoslovakia on April 7, 1959. Defendant is without knowledge or information sufficient to form a [fol. 30] belief as to the truth of the remaining allegations contained in paragraph 14 of the complaint.

15. Defendant denies the allegations contained in paragraph 15 of the complaint, except that defendant admits that the comment quoted appeared on the reverse of plaintiff's Affidavit to Explain Protracted Foreign Residence.

16. Defendant admits the allegations contained in paragraph 16 of the complaint.

17. Defendant admits the allegations contained in paragraph 17 of the complaint, except that the affidavit was current on December 8, 1960, and was communicated to plaintiff in a communication dated February 10, 1961.

18. Defendant denies the allegations contained in paragraph 18 of the complaint.

19. Defendant denies the allegations contained in paragraph 19 of the complaint.

19 (a). Defendant denies the allegations contained in paragraph 19 (a) of the complaint.

19 (b)(i). Defendant denies the allegations contained in paragraph 19 (b)(i) of the complaint.

19 (b)(ii). Defendant denies the allegations contained in paragraph 19 (b)(ii) of the complaint.

19 (b)(iii). Defendant denies the allegations contained in paragraph 19 (b)(iii) of the complaint.

19 (c). Defendant denies the allegations contained in paragraph 19 (c) of the complaint.

19 (c)(i). Defendant denies the allegations contained in paragraph 19 (c)(i) of the complaint.

19 (c)(ii). Defendant denies the allegations contained in paragraph 19 (c)(ii) of the complaint.

19 (c)(iii). Defendant denies the allegations contained in paragraph 19 (c)(iii) of the complaint.

19 (c)(iv). Defendant denies the allegations contained in paragraph 19 (c)(iv) of the complaint.

20. Defendant denies the allegations contained in paragraph 20 of the complaint.

21. Defendant denies the allegations contained in paragraph 21 of the complaint.

Third Defense

The complaint should be dismissed on the ground that the Court lacks jurisdiction of the person of the plaintiff.

Fourth Defense

The complaint should be dismissed on the ground that the Court lacks jurisdiction of the subject matter.

Fifth Defense

The complaint should be dismissed for the reason that plaintiff has failed to exhaust the exclusive remedies provided by Congress under Section 360 of the Immigration and Nationality Act of 1952.

Sixth Defense

Even assuming arguendo that the remedies available to plaintiff under Section 360 of the Immigration and Nationality Act of 1952 are not exclusive, they are the specified remedies which in the circumstances of the instant case must first be exhausted by plaintiff before the Court may obtain jurisdiction over the person of the plaintiff and the subject matter. The complaint fails to reflect any basis upon which plaintiff's failure to exhaust the specified remedies provided by Section 360 of the Immigration and Nationality Act of 1952 may be excused. Hence, the complaint should be dismissed by reason of plaintiff's failure to exhaust such remedies.

[fol. 32] *Seventh Defense*

The complaint fails to raise a substantial constitutional question.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ John F. Doyle
Assistant United States Attorney

/s/ Harold D. Rhynedance, Jr.
Assistant United States Attorney

Certificate of Service (omitted in printing)

[fol. 33] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION OF DEFENDANT FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, TO REMAND TO THE DEPARTMENT OF STATE—Filed Sept. 3, 1960

Comes now defendant by his attorney, the United States Attorney, and moves for summary judgment or, in the alternative, to remand to the Department of State for the reasons that on the basis of the pleadings and the record of the administrative proceedings of the Department of State pertaining to plaintiff there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law and that, if the Court determines that there is now present a genuine issue of material fact not previously asserted by plaintiff in such administrative proceedings, the case should be remanded to the Department of State for further appropriate administrative proceedings without the Court permitting a judicial trial *de novo* of such issue.

Attached hereto and made a part hereof are certified copies of records of the Department of State pertaining to plaintiff, identified as defendant's Exhibits A, B, C, D, E, F, G and H.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

[fol. 34]

/s/ John F. Doyle
Assistant United States Attorney

/s/ Harold D. Rhynedance, Jr.
Assistant United States Attorney

Certificate of Service (omitted in printing)

[fol. 35] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

SUPPLEMENT TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE TO REMAND TO THE DEPARTMENT OF STATE—Filed Sept. 9, 1960

Comes now defendant by his attorney, the United States Attorney, and supplements his motion for summary judgment or, in the alternative, to remand to the Department of State by the attached certified copies of documents from the files of the Department of State pertaining to plaintiff, identified as Defendant's Exhibit 1.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ John F. Doyle
Assistant United States Attorney

/s/ Harold D. Rhynedance, Jr.
Assistant United States Attorney

Certificate of Service (omitted in printing)

[fol. 36] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DEFENDANT'S STATEMENT PURSUANT TO LOCAL CIVIL RULE 9
Filed Sept. 3, 1960

I

Complying with Local Civil Rule 9(d) of this Court, defendant states that, in accordance with his view that the Court's function in the instant case is limited to judicial review of the prior administrative proceedings concluded by the Department of State respecting plaintiff, the following are the material facts as to which the former believes there is no genuine issue:

1. Plaintiff, who was born in Boston, Massachusetts, on December 27, 1927, left the United States on or about May 29, 1951 and arrived in England on or about June 2, 1951. He remained in England until July 30, 1954 and has been living in Czechoslovakia since August 8, 1954.

2. As of December 29, 1952, plaintiff intended to return to the United States on or before sometime in July 1953.

3. Plaintiff, who had previously registered with the Selective Service authorities, received notices from his local draft board, dated February 9, 1953, June 4, 1953 and July 3, 1953, ordering him to report for physical examination.

4. Plaintiff received an order from his local draft board, dated August 13, 1953, to report for induction on September 14, 1953.

[fol. 37] 5. Plaintiff did not comply with any of those notices and order or make any reply to the local draft board.

6. Plaintiff did not return to the United States as he had planned but remained in Europe.

7. During the above-mentioned period, the United States was in a state of national emergency.

8. The administrative authorities found the above-facts and additionally (a) that plaintiff had not overcome the presumption raised in the last sentence of Section 349(a)(10) of the Immigration and Nationality Act of 1952, and (b) that plaintiff remained outside of the jurisdiction of the United States for the purpose of avoiding training and service in the military, air, or naval forces of the United States, thus expatriating himself under the provisions of the aforementioned section of law.

9. Upon the conclusion of the administrative proceedings of the Department of State, plaintiff through counsel was advised of the final administrative determination.

II

If the Court decides, contrary to defendant's position herein, and notwithstanding the administrative record before the Court, that plaintiff may assert at this posture of the case factual issues which were raised or could have been raised in the previous administrative proceedings now concluded, defendant believes that the following paragraphs of plaintiff's "Statement Under Rule 9 Of The Civil Rules Of This Court" set forth genuine issues of material fact: 5, 6, 7, 9, 10, 15, 30, 31, 32, 34 and 35.

Nonetheless, the above-specified factual allegations were resolved against plaintiff in the previous proceedings of [fol. 38] the Department of State. As the administrative record of those proceedings is now before the Court, defendant believes that there no longer is any genuine issue of material fact but solely questions of law for consideration on judicial review of such record.

The remainder of the allegations found in plaintiff's Statement appear to reflect both immaterial facts (some being in dispute) and material facts not in dispute. Ac-

cordingly, no further response is believed required with respect to those allegations.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ John F. Doyle
Assistant United States Attorney

/s/ Harold D. Rhynedance, Jr.
Assistant United States Attorney

Certificate of Service (omitted in printing)

[fol. 39] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 868-60

JOSEPH HENRY CORT, PLAINTIFF

v.

CHRISTIAN A. HERTER, Secretary of State, DEFENDANT

OPINION—Oct. 11, 1960

Leonard B. Boudin, of New York, N. Y.; and David Rein, of Washington, D. C., for the plaintiff.

Oliver Gasch, United States Attorney, Edward P. Troxell, Principal Assistant United States Attorney, John F. Doyle and Harold D. Rhynedance, Jr., Assistant United States Attorneys.

Before EDGERTON, Circuit Judge, and TAMM and MATTHEWS, District Judges.

MATTHEWS, District Judge.

The plaintiff, a citizen of the United States by birth, has been declared to have lost his American citizenship by reason of remaining outside the United States for the purpose of avoiding training and service in the armed forces of this country. He has been refused a passport on which to return from abroad. He denies the purpose attributed to him and also challenges the validity of the law under which his loss of citizenship was declared. This law, Section 349(a)(10) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U.S.C. 1481(a)(10),[1] provides:

[1] Section 401 of the Nationality Act of 1940, 54 Stat. 1168, was amended in 1944 by adding a subsection (j), 58 Stat. 746. Section 401(j) was reenacted in the Immigration and Nationality Act of 1952 in Section 349(a) (10).

"(a) . . . a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by:

• • • •

"(10) departing from or remaining outside of the jurisdiction of the United States in time of war or [fol. 40] during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."

The plaintiff was born in Boston, Massachusetts, on December 27, 1927. He is a physician and research physiologist. In May 1951, he departed from the United States for temporary work in England. His draft board in Brookline, Massachusetts, ordered him to report in September 1953 for induction into the armed forces of the United States but he did not appear and thereafter was indicted on the charge of having failed to comply with the order. At the instance of the United States the British Government refused to renew the plaintiff's residence permit. Instead of returning to the United States he traveled to Czechoslovakia where he was and is employed. In 1959 he applied for a United States passport to enable him to return to this country. The Passport Office of the Department of State made an administrative decision that the plaintiff had expatriated himself by remaining outside the United States for the purpose of avoiding service in the armed forces and refused him a passport. Early in 1960 the Department's Board of Review on the Loss of Nationality affirmed the decision of the Passport Office.

Shortly thereafter plaintiff brought this suit for a judgment declaring him to be a citizen of the United States.

He seeks an interlocutory and permanent injunction to restrain the enforcement and execution of the challenged provision of law. He contends that Congress is without power to attach loss of citizenship as a consequence of avoiding service in the armed forces by remaining abroad. He also argues that such an exercise of power would violate the Due Process Clause of the Fifth Amendment to the United States Constitution as well as the prohibition against cruel and unusual punishments in the Eighth Amendment. On the plaintiff's application this three-[fol. 41] judge statutory court has been convened to hear and determine the case.[2]

A motion for summary judgment has been filed by the plaintiff and also by the Government. In addition the Government has moved to dismiss the action, asserting that the plaintiff has failed to pursue his exclusive remedy for obtaining a review of his citizenship status. This exclusive remedy, according to defendant, is provided by Section 360(b) and (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273-274, 8 U.S.C. 1503(b) and (c).

We will first give consideration to the ground advanced in support of the motion to dismiss. It is provided in subdivision (b) of Section 360 that any person who is not within the United States and who is denied a right or privilege upon the ground that he is not a national of the United States may make application to a diplomatic or consular officer for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Subdivision (c) of that section provides that if such person is granted and in possession of a certificate of identity he may then apply for admission to the United States at any port of entry, and if it is finally determined by the Attorney General that such person is not entitled to admission then such determination

[2] 28 U.S.C. 2282 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

is subject to review by any court of competent jurisdiction "in habeas corpus proceedings and not otherwise."

Section 360 may well be thought to provide an exclusive remedy for a person outside of the United States who has sought and obtained a certificate of identity and who has applied for admission to the United States at a port of entry. But we need not determine that question. The language of the section shows no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures out [fol. 42] lined in subsections (b) and (c). Neither does the section indicate that such persons are to be denied existing remedies. The legislative history of the section does not require such a construction. Cf. *Frank* v. *Rogers*, 102 U.S. App.D.C. 367, 253 F.2d 889; *Tom Mung Ngoie* v. *Dulles*, 122 F.Supp. 709 (D.C.D.C.). Subsections (b) and (c) were designed to regulate, not to require, the use of certificates of identity.

While the plaintiff might have applied for a certificate of identity for the purpose of following the procedure set forth in Section 360, there is nothing in this case to indicate that he ever did or that such a certificate has been issued to him. Instead, he has chosen to bring this action under the Declaratory Judgment Act for a judgment declaring him to be a United States citizen.

We hold that the complaint in this case presents a controversy to which the judicial power extends under the Constitution, and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act and the Administrative Procedure Act.[3] *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239-241, 244; *Perkins* v. *Elg*, 69 App.D.C. 175, 99 F.2d 408, affirmed 307 U.S. 325; *Tom Mung Ngoie* v. *Dulles*, supra; *Frank* v. *Rogers*, supra. The motion to dismiss is denied.

When, as here, a citizenship claimant establishes his birth in the United States the burden is upon the Government to prove by clear, convincing and unequivocal evidence the act it relies upon to show expatriation. *Nishi-*

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[3] Declaratory Judgment Act of June 14, 1934, 48 Stat. 955, as amended, 28 U.S.C. 2201. Administrative Procedure Act of June 11, 1946, 60 Stat. 237, as amended, 5 U.S.C. 1001.

kawa v. *Dulles*, 356 U.S. 129, 133. We think the Government has met this burden. In 1951 when the plaintiff went abroad it was for a limited period. On December 29, 1952, he accepted a position at the Harvard Medical School to begin the latter part of 1953, and indicated that he had made arrangements for prior transportation to the United States. His intention to return to this country was steadfast until he learned shortly after January 31, 1953, that the school authorities felt that they could not [fol. 43] declare him "essential" for teaching, and that he probably would be drafted. He wrote them on February 10, 1953, that until he heard "something definite" from the draft board he was "reluctant to take a decision that may prove to be foolish or premature." On February 9, June 4, and July 3 in 1953 the draft board sent him notices to report for physical examination, and thereafter ordered him to report for induction on September 14, 1953. The plaintiff made no response or compliance but remained abroad. We are convinced that his purpose was to avoid service in the armed forces.

The only question left in this case is the constitutionality of the law under which the Government maintains that the plaintiff was divested of his citizenship.

At the threshold of this issue we are faced with the decision of the Supreme Court in *Trop* v. *Dulles*, 356 U.S. 86. There Trop, the plaintiff, had been a private in the United States Army, serving in French Morocco. A general court-martial had convicted him of desertion and sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge. Some years after his return to the United States he applied for a passport. It was denied on the ground that by reason of his conviction and dishonorable discharge for wartime desertion he had lost his citizenship under the provisions of Section 401(g) of the Nationality Act of 1940, as amended.[4] Trop sued for a judgment declaring him to be

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[4] 54 Stat. 1168, 1169, as amended, 58 Stat. 4, 8 U.S.C. 1481(a)(8):

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

* * * * *

"(g) deserting the military or naval forces of the United

a citizen. The issue was whether his expatriation for desertion in war time comported with the Constitution. The Government's motion for summary judgment was [fol. 44] granted and the Court of Appeals for the Second Circuit affirmed. But the Supreme Court reversed, holding Section 401(g) unconstitutional, Mr. Justice Frankfurter, Mr. Justice Burton, Mr. Justice Clark and Mr. Justice Harlan dissenting.

The concept of the Chief Justice's opinion in *Trop*, in which three of his colleagues concurred, is that the purpose of Section 401(g) is "punishment" of a convicted deserter and hence, that "the statute is a penal law", P. 97, and that even if "it is assumed that the power of Congress extends to divestment of citizenship" the use of such divestment as punishment is barred by the Eighth Amendment's prohibition against cruel and unusual punishment. Pp. 99, 101. A fifth member of the Court, Mr. Justice Brennan, agreed that Section 401(g) is beyond the power of Congress, but on the ground that "the requisite rational relation between this statute and the war power does not appear . . . ." P. 114. The rationale of the dissenting opinion in *Trop* is that "Congress was calling upon its war powers when it made such desertion an act of expatriation", P. 121, that expatriation under the Nationality Act is not "punishment" in any valid constitutional sense, that "because denationalization was attached by Congress as a consequence of conduct that it had

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States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to the effective date of this Act, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom. . . ."

elsewhere made unlawful, it does not follow that denationalization is a 'punishment,' any more than it can be said that loss of civil rights as a result of conviction for a felony . . . is a 'punishment' for any legally significant purposes", P. 124, and that the legislation "is the result of an exercise by Congress of the legislative power vested in it by the Constitution . . . ." P. 128.

While the provision involved in *Trop* and the provision here in question are not the same, the Chief Justice pointed out that they are "essentially" alike. P. 93. The former decrees that conviction and dishonorable discharge for desertion in war time give rise to loss of citizenship. The latter decrees such loss for departing from or remaining outside the United States to avoid service in the armed forces during war time of a period of national emergency. The principal opinion in *Trop* comments at pages 93-94 on Section 401(j)—the provision involved here but now known as Section 349(a)(10)—as follows:

> "This provision was also before the Court in *Perez*, . . . but the majority declined to consider its validity. [fol. 45] While section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial."[5]

We perceive no substantial difference between the constitutional issue in the *Trop* case and the one facing us.[6]

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[5] In *Perez* v. *Brownell*, 356 U.S. 44, the petitioner had been declared to have lost his citizenship under Section 401(e) as well as under Section 401(j) of the Nationality Act of 1940. He claimed that both of the sections were unconstitutional. The Supreme Court held in its majority opinion that Section 401(e), which provided for loss of nationality by voting in a foreign election, was constitutional as a reasonable exercise of the power of Congress to deal with foreign affairs. In view of this holding, the Supreme Court did not find it necessary to consider also the constitutionality of Section 401(j).

[6] In the case of *Mendoza-Martinez* v. *Mackey*, 9 Cir., 238 F.2d 239, the Court of Appeals affirmed a decision of the District Court

The Court's ruling there is controlling here. Otherwise, Judge Tamm and I, for reasons expressed in the dissenting opinion, would uphold the validity of the provision under which the plaintiff was declared to have lost his citizenship. We all conclude that subdivision 10 of Section 349(a) of the Immigration and Nationality Act of 1952 is unconstitutional.

Accordingly the motion of the plaintiff for summary judgment is granted and that of the defendant is denied.

/s/ Henry W. Edgerton
United States Circuit Judge

/s/ Edward A. Tamm
United States District Judge

/s/ Burnita Shelton Matthews
United States District Judge

upholding the constitutionality of Section 401(j). The Supreme Court granted certiorari and remanded the cause to the District Court, 356 U.S. 258, for reconsideration in the light of *Trop*. On remand the District Court held that Section 401(j) is unconstitutional. Direct appeal was then made to the Supreme Court which noted probable jurisdiction, 359 U.S. 933, and again remanded to the District Court on a collateral issue unrelated to the constitutional question. *Mackey* v. *Mendoza-Martinez*, 362 U.S. 384

[fol. 46] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 868-60

JOSEPH HENRY CORT, PLAINTIFF

v.

CHRISTIAN A. HERTER, Secretary of State, DEFENDANT

JUDGMENT—October 25, 1960

This case having come before the Court on cross-motions for summary judgment, and the Court having considered the evidence and memoranda filed by the parties and having heard counsel in open court, and finding that there is no material issue of fact and that the plaintiff is entitled to summary judgment as set forth in the opinion of this Court of October 11, 1960, it is by the Court this 25th day of October, 1960,

ORDERED, ADJUDGED and DECREED:

1. That the plaintiff, Joseph Henry Cort, is declared to be, and to have been since his birth, a citizen of the United States of America and to be entitled to all the rights and privileges of a citizen of the United States.

2. That the statute, Section 349(a)(10) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U.S.C. 1481(a)(10), is unconstitutional.

3. That the certificate of loss of nationality issued by the defendant to the plaintiff on the ground that the plaintiff has expatriated himself and the defendant's decision to that effect are hereby declared to be null and void.

4. That the defendant, Christian A. Herter, Secretary of State, his officers, servants, employees, and attorneys, and all persons in active concert or participation with them be, and they hereby are, enjoined from withholding [fol. 47] from the plaintiff a United States passport on

the ground that he is not a citizen, or otherwise denying him any of the rights and privileges of a citizen of the United States, on the ground that he is not a citizen.

s Henry W. Edgerton
United States Circuit Judge

s Edward A. Tamm
United States District Judge

s Burnita Shelton Matthews
United States District Judge

No objection as to form:

s Harold D. Rhynedance, Jr.
Assistant United States Attorney

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. A. No. 868-60

JOSEPH HILNEY CORI, PLAINTIFF

v.

CHRISTIAN A. HERTER, Secretary of State, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES * — Filed Nov. 1, 1960

I. Notice is hereby given that the above named defendant appeals to the Supreme Court of the United States from the judgment of the district court, entered on October 25, 1960, declaring the plaintiff to be a citizen of the United States and enjoining the enforcement of Section 349(a)(10) of the Immigration and Nationality Act of 1952, on the ground that Section 349(a)(10) is unconstitutional.

This appeal is taken pursuant to 28 U.S.C. 1253.

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. The Complaint for Declaratory Judgment and Injunctive Relief, dated March 23, 1960.

2. The Plaintiff's Motion for Summary Judgment, together with the Affidavit of Plaintiff and Statement Under Rule 9 of the Local Civil Rules.

3. The Plaintiff's Request for a Three-Judge Court.

* This second notice of appeal is filed to correct the statement as to the date of entry of the judgment of the District Court. Thus the date of the judgment of the District Court is shown herein to be October 25, 1960 rather than October 21, 1960 as was stated in the notice of appeal heretofore filed on October 27, 1960.

(fol. 49) 4. The Defendant's Opposition to Plaintiff's Request for a Three-Judge Court and Request for Hearing Thereon, dated May 2, 1960.

5. The Defendant's Motion to Consolidate, dated May 2, 1960.

6. The Defendant's Motion to Dismiss, dated May 2, 1960.

7. The Order of Judge Matthews denying the Defendant's Motion to Dismiss and Consolidated.

8. The Answer, dated July 22, 1960.

9. The Amended Answer, dated September 14, 1960.

10. The Defendant's Motion for Summary Judgment or, In The Alternative, to Remand to the Department of State, dated September 2, 1960.

11. The Supplement to Defendant's Motion for Summary Judgment, dated September 9, 1960.

12. Defendant's Exhibits A, B, C, D, E, F, G, H, and I.

13. Defendant's Statement Pursuant to Local Civil Rule 9.

14. The Opinion of the District Court for the District of Columbia dated October 11, 1960.

15. Judgment, entered October 21, 1960.

16. Docket Entries.

17. This Notice of Appeal.

III. The following questions are presented by this appeal:

A. Whether the district court has jurisdiction of an action seeking a declaratory judgment of United States nationality and injunctive relief brought by a person residing abroad who claims that he has been denied a right as a United States national, or whether the exclusive remedy is under Section 360 (b) and (c) of the Immigration and Nationality Act of 1952.

B. Whether Congress has constitutional power to provide in Section 349 a(10) of the Immigration and Na

[fol. 50] tionality Act of 1952 that a United States national shall lose his United States citizenship by departing from or remaining outside the jurisdiction of the United States in time of war or national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

s/ Oliver Gasch
United States Attorney

Certificate of Service (omitted in printing).

[fol. 51] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER RE EXHIBITS—NOV. 21, 1960

The Clerk of this Court is hereby ordered to transmit the original exhibits in the above-entitled cause to the Supreme Court of the United States in connection with the appeal filed by the defendant.

s/ Burnita Shelton Matthews
Judge

Certificate of Service (omitted in printing)

Mod. 52 CIVIL DOCKET

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOCKET ENTRIES

Number 868-60

Parties

JOSEPH HENRY GORI

v.

CHRISTIAN A. HERTER, Secretary of State

Attorneys Forer and Rein
711 14th St., N.W.

Oliver Gasch
John F. Doyle
Harold Rhyndance
U.S. Atty's Office

Action For

DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Date 1960	*Account*
Mar. 23	Forer; Rec'd. 10.00
Mar. 23	U. S. Treas.: Disb'd. 10.00
Fol. 53	

Date 1960	*Proceedings*
1960	Deposit for cost by
Mar. 23	Complaint, appearance; filed
Mar. 23	Summons, copies (3) and copies (3) of Complaint, issued; Ser. 3-24-60; Atty Gen ser. 3-24-60, U.S. Atty ser. 3-23-60

Date	*Proceedings*
1960	
Apr. 26	Motion of pltff for preliminary injunction, P&A; Affidavit; c ser 4-26-60; filed
Apr. 26	Motion of pltff for summary judgment; P&A; Affidavit, Statement ser ack 4-26-60; filed
Apr. 26	Request by pltff for a three judge court; ser akn 4-26-60; filed
May 2	Motion of deft to consolidate with C.A. 777-60 & 324-60; P&A; c m 5-2-60; M.C. 5-2-60 (original filed in C.A. 777-60); filed
May 2	Motion of deft to dismiss; P&A; c m 5-2-60; M.C. 5-2-60; Appearance of Oliver Gasch, John F. Doyle & Harold Rhyndance; filed
May 2	Motion of deft for extension of time to oppose pltff's motion for summary judgment; P&A; c m 5-2-60; M.C. 5-2-60; filed
May 2	Opposition of deft to pltff's request for a three judge court & deft's request for hearing thereon; c/m 5-2-60; filed
May 3	Opposition of deft to Motion for preliminary injunction; c m 5-3-60; filed
May 6	Opposition of pltff to deft's motion to dismiss; c/m 5-6-60; filed
May 10	Memorandum by deft in reply to pltff's memorandum of P&A's in opposition to defts motion to dismiss; c m 5-10-60; filed
May 16	Supplement to defts' (1) opposition to pltffs' application for a three judge court & (2) memorandum in reply to pltffs P&A's in opposition to defts motion to dismiss; c m 5-16-60; filed
May 18	Application of pltff for convening of a three judge court heard & taken under advisement. (Rep. Ida Z. Watson) Matthews, J.
July 13	Order denying deft's motions to dismiss and to consolidate this cause with C.A. 324-60 and C.A. 777-60; (N) Matthews, J.
July 13	Notice to Chief Judge of the United States Court of Appeals for District of Columbia to designate a three-judge court; (N) Matthews, J.

Date	Proceedings
1960	
July 19	Order denying deft's motion to dismiss in C.A. 324-60 & C.A. 777-60; that deft's motion in C.A. 324-60 & C.A. 777-60 to consolidate is granted except as to C.A. 868-60; denying applications of pltffs. Schneider & d'Arbeloff Guerfieri to convene a three-judge court. (original filed in C.A. 777-60) (N) Matthews, J. [fol. 54]
July 20	Order designating Henry W. Edgerton, U.S. Circuit Judge and Edward A. Tamm, U.S. District Judge to serve with Burnita Shelton Matthews, U.S. District Judge as members of a three-judge court (Signed July 18, 1960) (N) Edgerton, J.
July 22	Answer of deft to complaint; c m 7-22-60; filed
July 22	Calendared (N)
Aug. 15	Amended answer; c m 8-8-60; filed
Sep. 3	Withdrawal of deft's motion for extension of time to oppose pltf's motion for summary judgment, per atty for deft; filed
Sep. 3	Motion of deft for summary judgment or in alternative to remand to Department of State; statement under Rule 9; P&A; annex A; exhibits A-H; c m 9-2-60. MC 9-3-60; filed
Sep. 9	Supplement of deft to motion for summary judgment or in the alternative to remand; c m 9-9-60; exhibit 1; filed
Sep. 9	Supplement of deft to memorandum of P&As in support of motion for summary judgment or in alterhative to remand; c m 9-9-60; exhibit; filed
Sep. 12	Points and authorities in support of motion for summary judgment and for preliminary injunction and opposition to deft's motion for summary judgment and to dismiss; filed
Sep. 12	Motion of pltf for summary judgment and for preliminary injunction and motion of deft for summary judgment argued and submitted; Judges Edgerton, Matthews and Tamm. (Rep. Elaine Wells)

Date	*Proceedings*
1960	
Oct. 11	Memorandum opinion granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment. (N) Judges Edgerton, Matthews and Tamm.
Oct. 20	Motion of deft for stay pending appeal; P&A; c/m 10-20-60; M.C. 10-20-60; filed
Oct. 21	Motion of deft for stay of summary judgment pending appeal argued & granted. Edgerton, Tamm and Matthews, J.; filed
Oct. 25	Order granting motion of pltff for summary judgment; declaring pltff to be a citizen of the U. S.; declaring Section 349 (a) (10) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1481 (a) (10)) to be unconstitutional; voiding certificate of loss of nationality; and enjoining deft from withholding from plaintiff
[fol. 55]	a United States passport. (N) Edgerton, Tamm, Matthews, J.
Oct. 25	Order staying effect of above order until notice of appeal is filed and for thirty days thereafter. (N) Edgerton, Tamm, Matthews, J.
Oct. 27	Notice of appeal by deft to Supreme Court of the United States from order 10-21-60; c m 10-27-60; filed
Nov. 1	Notice of appeal by deft to the Supreme Court of the United States from order 10-25-60; c m 11-1-60; filed
Nov. 21	Order Transmitting Original Exhibits in this cause to the Supreme Court of the United States in connection with the Appeal previously filed. (N) Matthews, J.

[fol. 56] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 57] SUPREME COURT OF THE UNITED STATES.

No. 567, October Term, 1960

CHRISTIAN A. HERTER, Secretary of State, APPELLANT

vs.

JOSEPH HENRY CORT

ORDER POSTPONING JURISDICTION—February 20, 1961

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. Forty-five minutes are allowed each side for oral argument.

February 20, 1961

[fol. 58] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 868-60

JOSEPH HENRY CORT, Praha 15, Na Sypcine 3, Prague, Czechoslovakia, PLAINTIFF

v.

CHRISTIAN A. HERTER, Secretary of State, Department of State, Washington, D. C., DEFENDANT

AFFIDAVIT OF PLAINTIFF, JOSEPH HENRY CORT
Filed April 26, 1960

REPUBLIC OF CZECHOSLOVAKIA)
CITY OF PRAGUE) ss.:
EMBASSY OF THE UNITED STATES)
OF AMERICA, CONSULAR SECTION)

JOSEPH HENRY CORT, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action.

2. I have read the complaint filed in this action and know the contents thereof. All of the facts alleged in the complaint are true and I incorporate them in this affidavit.

3. I was born in the United States on December 27, 1927. My parents are and at that time were naturalized Americans. I was married on August 20, 1949 to Ruth Mathilde Leyendecker, likewise an American citizen by birth, in Westchester County. We have two children, both American citizens and regularly registered as such at the American embassies abroad.

4. I received an M.D. degree from Yale University [fol. 59] School of Medicine in June 1951 and a Ph.D. degree from the University of Cambridge, England in June 1954.

5. My principal employment and fellowships may be summarized as follows:

1946-1948 Yale University School of Medicine, preclinical years. Research assistant in Dept. of Physiology under Prof. J. F. Fulton.

1948-1949 Henry Fellowship to Cambridge University, England. Studied Mathematics and Physics.

1949-1951 Yale University School of Medicine, clinical years. Research assistant (salaried) in Depts. of Physiology and Medicine under Profs. J. F. Fulton and J. P. Peters.

1951-1953 Research Fellowship from the National Foundation for Infantile Paralysis, Inc. at the Dept. of Experimental Medicine, Cambridge University, England under Prof. R. A. McCance.

1953-1954 Senior Lecturer (equivalent to Assistant Professor) in Physiology, University of Birmingham, England.

1954- Senior Scientific Research Worker, Institute for Cardiovascular Diseases, Prague.

A detailed statement of my educational background, employment, writings and biographical material is set forth in my "Application for Appointment as a Commissioned Officer in the United States Public Health [fol. 60] Service," executed on August 29, 1959 and annexed hereto as Exhibit A.

6. This action arises as a result of the defendant's refusal to issue me a passport upon the ground that I had lost my citizenship by remaining abroad for the purpose of avoiding my obligations under the Selective Service laws.

7. The complaint states what I have repeatedly set forth under oath, that I did not depart from the United States or remain abroad for the purpose of avoiding my military service obligations. In addition to the facts set forth in the complaint, which I have incorporated herein, I desire to call additional facts to the attention of the Court in the subsequent paragraphs.

8. No question has been raised with respect to my reasons for leaving the United States in 1951. They should however be set forth here as a necessary background to

the later events and explanation of the reasons for my actions and inactions.

9. I was called up under the original wartime Draft Law in 1946, examined and classified as 4-F. I reregistered under the 1948 Draft Law in 1949 and was classified 3-A. I was also registered at Draft Board No. 10, New Haven, Connecticut on May 25, 1951 under the Doctors Draft Act.

10. I had no reason to believe in 1951 that I would be drafted in the light of the physical disabilities indicated in my Record of Induction, a copy of which is annexed hereto as Exhibit E. It will be noted that my medical [fol. 61] history included "Residual poliomyelitis, residual tuberculosis, dangerous allergy, marked myopia, demonstrable lesions."

11. I had paid one visit to Europe prior to my departure in 1951. In 1948 I was offered the position of a Henry Fellow at Clare College, University of Cambridge, England. I received a United States passport on June 1, 1948 which was subsequently renewed on June 19, 1950. I studied at the University of Cambridge from September, 1948 to June, 1949, returning to the United States where I worked as a research assistant in the departments of physiology and medicine at Yale University School of Medicine.

12. The purpose of my leaving for Europe in 1951 was to accept a position as a Research Fellow at the University of Cambridge, England. This was a fellowship given by the National Foundation for Infantile Paralysis, an American organization. Although the Doctors Draft Act had been passed, the effective date for registration under it had not occurred. Accordingly, I consulted Dr. Samuel Harvey, now deceased, the Yale University Advisor on the draft. I was told that I could register in advance under the draft and that I could leave the United States for purposes of accepting the fellowship. Accordingly, I registered under the draft and left the United States on May 29, 1951 with my wife. I was thereafter employed at the University of Cambridge in its Department of Experimental Medicine where I did research, and acted as an official tutor from June 1951 to May 1953.

[fol. 62] 13. While at the University of Cambridge I was offered the position as lecturer in physiology at the University of Birmingham, England. I accepted that position which was intended to be of permanent duration and began employment in May 1953. My employment was terminated in July 1954 under the circumstances set forth below. None of the foregoing work or travels was motivated by any desire to avoid my Selective Service obligations. As indicated above, I had not only registered for the draft prior to the effective date but I had gotten clearance from the Advisor at Yale University.

14. Shortly after my arrival in England, the American Embassy wrote me several letters requesting me to deliver my passport to it to be made valid "only for return to the United States." Attached are its letters of November 28, 1951, December 10, 1951 and December 27, 1951, as Exhibits C, D and E.

15. Upon information and belief such letters were sent to hundreds of Americans residing abroad and elsewhere whose past political associations were disapproved of by the Department of State. I am advised and believe that the American Embassy in London was a prolific source of such letters. At the time these letters were sent there were no State Department regulations setting forth standards for the denial or withdrawal of passports for political reasons. Such standards and procedures implementing them were first promulgated by the Department on August 28, 1952 and declared unauthorized by law almost six [fol. 63] years later in *Kent and Briehl* v. *Dulles*, 357 U. S. 116, by the United States Supreme Court.

16. The effect of these letters from the American Embassy was to prevent me from traveling outside Great Britain, to make it clear to me that at least one branch of the United States Government was engaged in persecuting individuals for their political associations and that I was one of those individuals. I did not respond to the Department's demands because I believed that they were unlawful and I did not wish to subject myself to this and similar forms of political persecution then prevalent in the United States. As indicated briefly in this and the next two paragraphs, I was engaged in important

research and teaching work in physiology and I desired to continue earning a livelihood for my family.

17. I was indicted on December 17, 1954, by a federal grand jury in the District of Massachusetts for having "unlawfully and knowingly failed and neglected to report for induction." A copy of the indictment is annexed hereto as Exhibit F.

18. My fears were reaffirmed then and later by the activities of the House Committee on Un-American Activities, herein referred to as the Committee. I was of course aware of that Committees' operations generally. Then, in the Spring of 1953 it came to my attention that some of my former colleagues at Yale had been subpoenaed by the Committee and asked questions concerning me and others described by the Committee's counsel as persons [fol. 64] who "were members of a student group of the Communist Party at Yale University." (Hearings before the Committee on Un-American Activities, House of Rep., 83rd Cong., 1st Sess., April 23, 1953, p. 1129). I was also aware of the implications of the decision of the United States Supreme Court in *Dennis* v. *United States*, 341 U. S. 494. On June 4, 1951, subsequent to my departure for Europe, the Court had upheld the constitutionality of the Smith Act, 54 Stat. 671.

19. These occurrences, as appears below, rather than the question of military service, were the basis of my decision to continue my medical research and teaching in England despite the receipt of a local Selective Service Board notice to report to Brookline, Massachusetts for induction. I was of the opinion that this notice was not based upon any desire to have me perform military duties in the armed forces of the United States. Rather, I was convinced that my physical disabilities plus my political disabilities were enough to preclude any desire on the part of the military authorities to employ my services. I had been a member of the Communist Party at Yale from December 1946 to May 1951 (with the exception of August 1948 to July 1949 when I was in England), a fact known, of course, to the government security agents and known even to the House Committee on Un-American Activities. My views as to the Government's intention in

serving me with these notices was colored too by the investigations of the Army and other governmental branches by Senator Joseph McCarthy.

[fol. 65] 20. I consulted an eminent English solicitor, Mr. Samuel Silverman, M.P., who advised me that under English and international law I was not legally required to respond to the said notices so long as they were transmitted to me while I was on English soil.

21. I remained at my post in Birmingham, continuing to do the work which I had contracted to do until 1954 when the English government refused to renew my permit to remain. During the several months prior thereto the United States Government, upon information and belief, had put pressure upon the British Government to deport me. I was therefore actively engaged in seeking employment in some other country where I would not be subjected to restrictions upon my liberty of movement through investigation by legislative committees for past political associations and for possible criminal prosecution for the same reason. I sought such employment in Israel and India, when the first formal offer came from the Cardiovascular Institute in Czechoslovakia, which I thereupon accepted.

22. From 1954 to date I have been employed at the Institute as a Senior Scientific Research Worker doing much the same work as I had previously done. During this entire period of my employment in Czechoslovakia I have endeavored to retain my ties to the United States through family, friends and scientific acquaintances. I have not committed a single act which could properly be characterized as disloyalty to the United States nor have I engaged in any conduct indicating a transfer of allegiance. I have not voted in elections in Czechoslovakia, [fol. 66] have not joined its military forces and have not taken any oath of allegiance to its government. I have not occupied any position which is open only to its nationals nor have I exercised the rights of a Czechoslovakian national.

23. My wife is likewise not engaged in any conduct which might suggest a lack of allegiance to the United States or a transfer of allegiance to a foreign country.

We have registered our two children as citizens to the American Embassy and taught them English. My wife has secured and used an American passport. Our parents and their other children are all American citizens, all residing in the United States.

24. In 1959 my wife came to the United States for two reasons:

(1) to be examined and treated for an illness diagnosed abroad and unsatisfactorily treated there as multiple sclerosis, and

(2) to seek to make arrangements with my counsel, Mr. Leonard B. Boudin, whom I had retained in December 1958 and the various government agencies involved for my return to the United States and the fulfilment of my Selective Service obligations.

25. In pursuance of the first objective my wife met with various physicians and secured their diagnoses and treatment. She was unable to continue their treatment in the United States, despite medical advice to that effect, because of the need to return to her family in Czechoslovakia which she did in the Fall of 1959.

[fol. 67] 26. In pursuance of the second objective my wife and Mr. Boudin met with representatives of the Department of Justice and were advised that it was the policy of the Department to dismiss the indictments against draft delinquents where they sought, although belatedly, to carry out their obligations under the Selective Service laws. I wish to make it perfectly clear that no commitment was made by the Government that this policy would necessarily be followed in my case. It was suggested by the Department of Justice that the matter be discussed with officers of the Selective Service System.

27. Accordingly my wife and Mr. Boudin on July 23, 1959 met with Major Alexander Nuta, Assistant General Counsel of the Selective Service System and thereafter with General Hershey, the Director of the Selective Service System. Again, I wish to emphasize that no commitments were made by the Selective Service System. General Hershey did however state definitely that the most reasonable method of seeking to comply belatedly with my Selective Service obligations would be an application to

the United States Public Health Service. He had considerable doubt that the Army would accept me or believed that it would have accepted me in 1953 in view of the political and physical disabilities referred to above. I annex hereto as Exhibits G through O the principal correspondence of my counsel with the Selective Service System on the subject.

28. On September 21, 1959, following meetings which my wife had had with the United States Public Health [fol. 68] Service my counsel filed an application for a commission on my behalf, a copy of which is attached hereto as Exhibit A. A copy of the correspondence on the subject is annexed hereto as Exhibits P through V.

29. On September 3, 1959 I wrote to the Chief of the Office of Procurement Program at the Headquarters of the First United States Army, Governors Island, seeking information as to the availability of a United States Army internship. On September 15th I received a reply from the Army indicating that I would have to return to the United States for further information; copies of these letters are annexed hereto as Exhibits X and Y.

30. I did not apply for induction into the Armed Forces since, as appears above from Exhibit L, such an application cannot be made to a local Selective Service Board where there is a pending indictment.

31. I had been advised by the Public Health Service that it would be necessary for me to appear personally for the final processing of the application on December 1, 1959. I therefore directly and through counsel expeditiously took all steps necessary to secure my return to the United States, including the following:

(a) On April 7, 1959 I filed an application for a passport at the American Embassy in Prague. A copy of this application is annexed hereto as Exhibit Z.

(b) Subsequently in response to the request of the Consul I executed on August 24, 1959 an "Affidavit by native or naturalized American to explain protracted residence abroad." This is part of Exhibit Z.

[fol. 69] On August 24, 1959, I also executed an affidavit including a supplementary explanatory statement explaining that my residence abroad was not for the pur

poses of avoiding military obligations. This too is part of Exhibit Z.

32. In connection with this document I respectfully call the Courts' attention to the document attached as part of Exhibit Z, entitled "Opinion of Officer taking Affidavit." This is the opinion of Mr. John M. Dennis, the American Consul at Prague, who interviewed me, in which he states in the language set forth in paragraph 15 of the complaint that the American consul was of the opinion that I had not remained abroad for the purpose of avoiding the draft and therefore that I had not lost my American citizenship.

33. My wife and Mr. Boudin met in the Summer and Fall of 1959 with numerous officials of the States Department for the purpose of facilitating the issuance of a passport to me. They urged the need for speed in the Department's action because of my wife's health and the need to process my application to the Public Health Service by December 1, 1959. In one such conversation the Department reported an informal opinion of the General Counsel of the Selective Service System that mine was a case of serious delinquency under the Selective Service laws. My counsel thereupon wrote the letter annexed hereto as Exhibit AA and dated October 14, 1959. This merely resulted on October 16, 1959 in a telegram from the Chief of the Foreign Operations of the Passport Office, [fol. 70] annexed hereto as Exhibit BB, disapproving the application for a passport on the ground of my alleged expatriation on September 14, 1953.

34. At the request of my counsel the Department facilitated hearings before its Board of Review on the Loss of Nationality and such hearings were held on October 28, 1959. The hearing consisted of an oral argument by Mr. Boudin together with the formal documents such as the application for passports and correspondence with the various government agencies involved. Subsequently Mr. Boudin transmitted to the Board a copy of the statement made by me on October 23, 1959, which is annexed hereto as Exhibit CC. No evidence was submitted to the Board of Review on the Loss of Nationality to show that I had remained abroad for the purpose of avoiding my obligations under the Selective Service laws.

35. I shall submit at the time of any motion in this case the transcript of the proceedings before the Board of Review on the Loss of Nationality.

36. Although this hearing was held on October 28, 1959 and I and my counsel repeatedly emphasized the necessity of a decision before December 1st by reason of the need to be physically present in the United States, the decision was not rendered until February 10, 1960. A copy of the decision, adverse to me, is annexed hereto as Exhibit DD.

37. On November 2, 1959, prior to my knowledge of the Board's decision, I filed a statement with the American Embassy in Prague, a copy of which is annexed hereto as Exhibit EE.

(fol. 71) 38. Further difficulty subsequently arose with respect to the Public Health Service. On November 6, 1959 both I and my wife received letters rejecting our applications for employment in the Public Health Service. My counsel wrote to the Public Health Service on November 17, 1959 inquiring as to the reasons for the rejection. In reply the Department declined to answer the questions put by my counsel and indicated the unavailability of any method for administrative review. This correspondence appears in Exhibits T through U.

39. I have been denied a passport on the ground that I expatriated myself under 349 (a) (10) of the Immigration and Nationality Act of 1952, by remaining abroad for the purpose of avoiding the draft. No evidence has ever been presented to me, nor so far as I know to any governmental authority, to support this conclusion as to my reasons for remaining abroad. All that the government has ever relied upon as far as I know is the statutory presumption in 349 (a)(1) that:

> "Failure to comply with any provision of any compulsory service laws of the United States, shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."

I have challenged the constitutionality of such a presumption in the proceedings before the Board of Review

on the Loss of Nationality and I maintain the same position in this litigation. I am further advised by counsel and believe that the statutory presumption arises only [fol. 72] after there has been a judicial determination—perhaps only in a criminal proceeding—that there has been a "failure to comply with any provision of any compulsory service laws." And administrative agency such as the State Department cannot make an adjudication of such a "failure to comply." It certainly has not made such an adjudication in the administrative proceedings which underlay the present lawsuit.

40. The "failure to comply" depends upon a multiplicity of legal considerations which may very well be raised at any criminal trial if I am ultimately prosecuted under the indictment. These include such matters as:

(a) The validity of service by reason of principles of extraterritoriality.

(b) The *bona fides* of the induction order.

(c) Whether I can be said legally to have been in a position to respond to the order in view of the immobility created by the denial of passport facilities to me.

(d) The effect of my reasonable reliance upon legal opinion.

(e) Whether by reason of physical and political disabilities I would ever have been eligible for military induction.

I mention these factors because they indicate that such a "failure to comply" cannot be determined in the present case and therefore that the statutory presumption cannot apply.

[fol. 73] 41. However if such a presumption were held to apply notwithstanding the matters set forth in the paragraph next above I submit that I have overcome such a presumption by my affidavits and my other statements made as part of the passport application as to the reasons for my remaining abroad. I think it abundantly clear from what I have said that I remained abroad because of fears, true or unfounded, as to the possibilities of political persecution and not because of an unwillingness to serve in the Armed Forces of my country.

42. I seek an adjudication that I am an American citizen because the United States is the country of my birth and the only country to which I have ever and to which I do today have allegiance. If it should be determined that I am not an American citizen, then I am a citizen of no other country and I am therefore stateless. I need not set forth here the psychological, material and political consequences of statelessness in the modern world.

43. I also desire a declaration of nationality because as incident thereto I shall be able to secure through this Court a United States passport. This will restore to me one of the basic rights of an American citizen of which I have been deprived for nine years on the basis of departmental policies now finally adjudicated by the Supreme Court to be and to have been illegal.

44. I seek also relief of the kind referred to above because I desire to return to the country of my birth and to live and work here in the United States as an [fol. 74] American citizen. I want to live and bring up my children in the United States. I want them to carry out their obligations and to exercise their rights of citizenship.

45. I want also to carry out my duties of citizenship including the performance of my obligations under the Selective Service laws. Like many other persons in the last decade I foresaw an endless period of increasing political persecution, which I am happy to say has not materialized. I was wrong in my forebodings and I and my family have materially suffered as a result. I can only say to the extent that a self serving declaration like this has value that I honestly believed in the position that I took as reflected in the exhibits attached to this affidavit. Such a belief was sincerely held by many thousands of Americans and was indeed reflected in many dissenting opinions of the courts, including the Supreme Court of the United States.

46. I desire to return to the United States for the purpose of responding to the indictment. This has been the subject of discussions between my counsel and the Attorney General's office as well as the office of the United States Attorney for the District of Massachusetts. It is

of course my hope that the indictment will be dismissed in accordance with the government's policy as set forth above in paragraph 26. Alternatively it is my hope that it would be dismissed for other reasons, some of which are set forth in paragraph 40 above. But whether it is dismissed or whether I am to be tried upon it, I have for more than a year now sought in every way to return to the United States for the purpose of facing the charges set forth in the indictment.

[fol. 75] 47. Finally, I wish to return to the United States as an American citizen in order that my wife can have the medical treatment afforded by laboratories and hospitals in the United States for her illness. Neither she nor I wish to have our family broken up by my remaining in Prague while she and the children return to the United States without me. The reasons for this feeling are obvious and need not be further stated here.

/s/ Joseph Henry Cort
Joseph Henry Cort

Subscribed and sworn to before me this 5th day of April 1960

[SEAL]

/s/ Robert W. Kent Jr.
Robert W. Kent Jr.

Vice Consul of the United States of America,
duly commissioned and qualified.

Service No. 316
Tariff item No. 45
Fee Paid: U. S. $2.50

Local Cy. Equiv.: 36.00 Cz. Cr.

[fol. 76] PLAINTIFF'S EXHIBIT A

✓ Plaintiff's Exhibit A

ACT

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
PUBLIC HEALTH SERVICE

Form approved
Budget Bureau No. 68-R104

APPLICATION FOR APPOINTMENT AS A COMMISSIONED OFFICER IN THE UNITED STATES PUBLIC HEALTH SERVICE
ACTIVE DUTY OR INACTIVE STATUS FUNDS TO CALL TO EXTENDED ACTIVE DUTY*

Type or print your application properly. Read instructions on page 4. Answer ALL questions. If any are not applicable, so state. Submit THREE copies to the Surgeon General, Public Health Service, Washington 25, D. C. Attention: Division of Commissioned Personnel. Personal information may be used at later date for other purposes.

If more space is required for answering or furnishing details on any question in this form, submit the additional information by attaching 8 x 10½" sheets. Place your name, address and the question number on each attached sheet.

TYPE OF COMMISSION FOR WHICH YOU ARE APPLYING (Information required ONLY if recommended)

☒ REGULAR (Applies to career appointment)

☐ RESERVE (Officer Corps reserved active duty in the Commissioned Reserve)

FOR USE OF THIS BRANCH

☐ 1A ☐ 1 ☐ 1A

☐ 2 ☐ 2 ☐ 2A

FULL NAME (Last Name)	(First Name)	(Middle Name)	DATE OF BIRTH	AGE
CORT	Joseph	Neary	Dec. 27, 1927	31

OTHER NAMES USED (Maiden name, nickname, or name changed legally or otherwise. Give explanation on reverse side and show dates used.)

PLACE OF BIRTH (City and State, or Foreign Country)

HEIGHT 6'2"

WEIGHT 170 lbs.

none

Boston, Mass.

TITLE OF PROFESSION (e.g. Doctor, Nurse, Engineer)

Physician, Research Physiologist

SEX ☐ MALE ☐ FEMALE

MARITAL STATUS ☐ SINGLE ☒ MARRIED ☐ WIDOWED ☐ DIVORCED

IF MARRIED, WIDOWED OR DIVORCED, GIVE FULL NAME AND DATE AND PLACE OF BIRTH OF SPOUSE OR FORMER SPOUSE AND DATE AND PLACE OF MARRIAGE (Include wife's maiden name. Use maiden name regardless of previous marriages.)

Dr. Ruth Mathilde Leyendecker Cort (M.D.), born July 30th, 1925, New York City. Married Aug. 20th, 1949, Westchester County, N.Y. Maiden name, Ruth Mathilde Leyendecker.

PRESENT MAILING ADDRESS (Number, Street, City, Zone, State)

c/o Leyendecker, Box 37, Pelham, N.Y.

LEGAL RESIDENCE (Number, Street, City, Zone, State)

TELEPHONE NO. Pe 8-0587 (And for further notice or report from assigned duty station upon discharge.)

IDENTIFYING NUMBERS (Social Security, armed forces serial or service number, Veterans Administration claim number, passport number, driver's registration number, seaman's certificate of identification or other number)

social security 034-18-3285 Passport (1948-1952) #221544

DATES AND PLACES OF RESIDENCE (Begin with present and go back 10 years)

From	To	Number and Street	City	State
1954	-	3, Na Sypoine	Prague 15	Czechoslovakia
1953	1954	10, West Hill Road	Birmingham 30	England
1952	1953	94, Hartington Grove	Cambridge	England
1951	1952	54, Grantchester Meadows	Cambridge	England
1949	1951	161, York st.	New Haven	Conn.

DATES, NAMES AND ADDRESSES OF EMPLOYERS (Begin with present and go back 10 years)

From	To	Employer	Address
1954	-	Institute for Cardiovascular Research	Prague 14, Czechoslovakia
1953	1954	University of Birmingham (Medical School)	Birmingham 15, England
1951	1953	National Foundation for Infantile Paralysis, Inc., Fellowship at University of Cambridge, Dept. of Experimental Medicine, England	120 Broadway, New York 5, N.Y. Tennis Court Rd., Cambridge, England
1949	1951	Dept. of Medicine, Section of Metabolism Yale University School of Medicine	789, Howard Ave., New Haven, Conn.

ORGANIZATIONS WITH WHICH AFFILIATED (Use end pages. OTHER THAN RELIGIOUS OR POLITICAL ORGANIZATIONS OR THOSE WHICH DEFINE RELIGIOUS OR POLITICAL AFFILIATIONS. Give offices held.)

New York Academy of Sciences, Renal Association (London, England), Royal Society of Medicine (London, England), Sigma Chi (New Haven, Conn. branch), Physiological Society (London, England), Societies of Physiology, Internal Medicine, Biophysics (Prague, Czech.)

INDICATE ANSWERS BY PLACING X IN PROPER COLUMN

	YES	NO
a. [illegible]		X
b. [illegible]	X	
c. [illegible]		X

* If you answer to question A, C, or D is yes, attach an explanatory sheet to be numbered to and made a part of this application. (In answering all such explanations, consecutively number a group of questions and identify each answer by number only. Give complete details of your activities during and since duty or obligations upon which your application is based.)

** If interested in being called to active duty only during national emergency or national interest, or for short periods of active duty training, use short form, PHS-3418

Dr. Ruth Leyendecker Cort	wife	7	30	25	
Nicholas Cort	son	6	26	55	
Susannah Cort	daughter	8	8	57	

EDUCATION

Boston Latin School, Boston 15, Mass.			1938	1944	June, 1944
Harvard College, Cambridge 38, Mass.	Biochem	July 1944	June 1946	26 courses	
Yale University School of Medicine, New Haven 11, Conn.	Medicine	Sept. 1946	June 1948		
"	"	Sept. 1949	June 1951		June M.D. 1951
University of Cambridge, England	Physics Physiol.	1948-9 & VI,1951	June 1953		June Ph.D. 1954

German, Czech	X	X
Polish, Russian, French	X	X
other slavic language	X	

see attached list

New York Academy of Sciences - fellow
Renal Association (U.K.) - member
Sigma Chai - member
Royal Soc. Med. (U.K.) - was a member
Physiol. Soc. (U.K.) - was a member
Med.Res.Soc. (U.K.) - was a member

Sigma Chai
Henry Fellowship (Yale to Cambridge, England)

August, 1954 — Senior Scientific Research Worker — 5

2000 crowns month
3000 " month

Institute for Cardiovascular Research

Prague, 14
Czechoslovakia

desire to return home and fulfill citizen's obligations by service

Dr. Jan Brod, Institute for Cardiovascular Research, Prague 14, Czechoslovakia

lead research team on problems of electrolyte and water metabolism, provide metabolic consults on clinical problems of electrolyte and water metabolism, direct all work with radioactive isotopes in research and practice; develop physical instrumentation, advise on all medical and biological use of radio-isotopes in Czechoslovakia, plan the construction of a National Isotope Institute. Train graduate students, teach in postgraduate courses.

[fol. 78]

DATES OF EMPLOYMENT (Month, Year) — EXACT TITLE OF YOUR POSITION — NUMBER OF PERSONS SUPERVISED

FROM 1953, May TO July, 195- Lecturer in Physiology 3

SALARY OR EARNINGS — KIND OF ORGANIZATION (Educational, Industrial, Government agency, etc.) — PLACE OF EMPLOYMENT

STARTING £1000 PER year University of Birmingham, England CITY Birmingham 15 STATE England

FINAL PER

REASON FOR LEAVING — NAME AND ADDRESS OF MAJOR SUPERVISOR

cancellation of permit to stay in England Prof. H.P. Gilding, Dept. of Physiology The Medical School, Birmingham 15, England

DESCRIPTION OF DUTIES Lecture in physiology and metabolic medicine to medical students. Train graduate students. Carry out research in electrolyte and water metabolism on clinical and animal material, and lead small research team. Organise and run laboratory courses for medical and graduate students.

DATES OF EMPLOYMENT (Month, Year) — EXACT TITLE OF YOUR POSITION — NUMBER OF PERSONS SUPERVISED

FROM June, 1951 TO May, 1953 Research Fellow 2

SALARY OR EARNINGS — KIND OF ORGANIZATION (Educational, Industrial, Government agency, etc.) — PLACE OF EMPLOYMENT

STARTING 4700 PER year University of Cambridge, England Nat. Found, Infant. Paralysis, Inc. CITY Cambridge STATE England

FINAL PER

REASON FOR LEAVING — NAME AND ADDRESS OF MAJOR SUPERVISOR

offered permanent, more senior, position at University of Birmingham Prof. R.A. McCance, F.R.S., Dept. of Experimental Medicine, Tennis Court Rd., Cambridge, England

DESCRIPTION OF DUTIES Carry out research on acidosis and electrolyte and water metabolism in young animals, infants and adult clinical material. Teach advanced students in physiology by lecturing and as an official tutor of the University.

DATES OF EMPLOYMENT (Month, Year) — EXACT TITLE OF YOUR POSITION — NUMBER OF PERSONS SUPERVISED

FROM 1949 TO May, 1951 Research Associate 1

SALARY OR EARNINGS — KIND OF ORGANIZATION (Educational, Industrial, Government agency, etc.) — PLACE OF EMPLOYMENT

STARTING 200 PER month Yale University School of Medicine, New Haven STATE Conn.

FINAL PER

REASON FOR LEAVING — NAME AND ADDRESS OF MAJOR SUPERVISOR

offered research fellowship for further training Prof. L.G. Welt, Dept. of Medicine, Univ. of North Carolina, Chapel Hill, N.C.

DESCRIPTION OF DUTIES Carry out animal research on the effect of adrenal steroids and ACTH on the metabolism of electrolytes and water.

DATES OF EMPLOYMENT (Month, Year) — EXACT TITLE OF YOUR POSITION — NUMBER OF PERSONS SUPERVISED

FROM Sept, 1948 TO June 1949 Henry Fellow -

SALARY OR EARNINGS — KIND OF ORGANIZATION (Educational, Industrial, Government agency, etc.) — PLACE OF EMPLOYMENT

STARTING £600 PER year Clare College, University of Cambridge, England CITY Cambridge STATE England

FINAL PER

REASON FOR LEAVING — NAME AND ADDRESS OF MAJOR SUPERVISOR

return to complete medical education Sir Henry Thirkill, the Master's Lodge, Clare College, Cambridge, England

DESCRIPTION OF DUTIES study advanced courses in physics, physical chemistry and mathematics for application in a future career of research into physiology and biophysics.

[fol. 79]

translator (scientific matter only) translation from Czech, Russian to English 1955 to present

NOTE: Questions 31 and 32 should constitute a complete occupational history. Please explain in an attachment any periods of time not covered above.

FULL NAME	PROFESSIONAL RELATIONSHIP TO APPLICANT	COMPLETE PRESENT ADDRESS (Street & Number)
Prof. Robert Aitken, F.R.S.E.	Vice-chancellor, Univ. Birmingham	The Vice-Chancellor, The University, Edgbaston, Birmingham 15, England
Prof. Josef Charvat	Scientific Council Ministry of Health	IIIrd Clinic of Internal Medicine, Pracne II (Hemocrice, (Charles University)
Prof. Donald H. Barron	former assist. dean Yale Med. School	Dept. of Physiology, Yale University School of Medicine, 333 Cedar st., New Haven 11, Conn.
Prof. Daniel C. Darrow	former teacher and adviser on research	Dept. of Pediatrics, University of Kansas

SELECTIVE SERVICE 34 WERE YOU EVER DEFERRED BY SELECTIVE SERVICE? [X] YES [ ] NO IF YES FROM 1946 TO 1948 REASON residual poliomyelitis, medical school

35 ARE YOU SUBJECT TO THE GENERAL DRAFT? [ ] YES [X] NO 36 ARE YOU SUBJECT TO A SPECIAL DRAFT? [X] YES [ ] NO 37 SELECTIVE SERVICE NUMBER 19 25 27 40

38 DRAFT CLASSIFICATION GENERAL SPECIAL 39 PRIORITY GROUP (Specify) 40 NAME AND ADDRESS OF LOCAL BOARD WHERE REGISTERED Local Board no. 25, Norfolk County, 34 Marion st. Brookline, Mass.

41 HAVE YOU RECEIVED AN ORDER FOR INDUCTION (SSS Form 201)? [X] YES [ ] NO Date order issued by your draft board 1953 Date specified for induction 1953 Is the order for induction under General or Special Draft? general Fill in General or Special

MILITARY SERVICE 42 WERE YOU EVER REJECTED FOR ANY BRANCH OF MILITARY SERVICE? [ ] YES [ ] NO If "Yes" state when and where rejected and reason

43 List below in chronological order all service you have had in the ARMY, NAVY, AIR FORCE, MARINE CORPS, COAST GUARD, AND [illegible] SERVICE (including service performed before September 2, 1945 in the armed forces of any country allied with the United States). Include month, day and year for each entry. From 6-9-43 to 10-29-45

TYPE OF DUTY AND DATES OF EACH

BRANCH OF SERVICE	GENERAL DUTY FROM	GENERAL DUTY TO	ASTP OR V-12 FROM	ASTP OR V-12 TO	INTERNSHIP FROM	INTERNSHIP TO	RESIDENCY FROM	RESIDENCY TO	TRAINING FROM	TRAINING TO	EXTENDED ACTIVE DUTY* OR INACTIVE STATUS (Specify)	HIGHEST RANK HELD

*In separate sheet describe type of training *Extended duty means active duty of more than 90 days

44 Have you ever been arrested, charged or held by Federal, State or other law enforcement authorities for any violation of any Federal, state, county or municipal law, regulation or ordinance. Do not include anything that happened before your 16th birthday. Do not include traffic violations for which a fine of $25 or less was imposed. All other charges must be included even if they were dismissed. [ ] YES [X] NO

If answer is "Yes" give full details for each case, approximate date, charge, penalty, if any, and name(s) and address(es) of law enforcement agency(ies) involved.

45 SPECIFIC KIND OF ASSIGNMENT IN WHICH YOU ARE MOST INTERESTED internship

46 TYPE OF ASSIGNMENT FOR WHICH YOU CONSIDER YOURSELF BEST QUALIFIED research

47 TYPE OF GENERAL ASSIGNMENT PREFERRED (Indicate by inserting "1", "2", "3" or "4" in order of preference) [1] CLINICAL CARE OF PATIENTS [2] RESEARCH [4] ADMINISTRATIVE DUTIES [3] PUBLIC [illegible]

48 GENERAL TYPE OF DUTY PREFERRED (Indicate by inserting "1", "2" and "3" in order of preference) [1] CONTINENTAL DUTY [2] FOREIGN DUTY [3] SEA DUTY

49 GEOGRAPHICAL AREA IN WHICH YOU PREFER TO SERVE Northeast, New York

50 DATE YOU WILL BE AVAILABLE FOR ACTIVE DUTY Dec. 1st, 1959

51 OFFICIAL TRANSCRIPTS of grades made during all college, graduate, and professional training MUST BE SUBMITTED WITH APPLICATION as soon as possible. Be sure to request statement of standing in graduating class.

52 I CERTIFY that the foregoing facts are accurate and complete to the best of my knowledge and belief. I understand that they will be investigated and that any willfully false representation is sufficient cause for rejection of this application or for dismissal from the Service. I am willing to serve in any area or climate or wherever the exigencies of the Service may require.

DATE 29th of August, 1959 SIGNATURE [signature] (Sign your name in ink as it is written in full)

[illegible] U.S. GOVERNMENT PRINTING OFFICE [illegible]

[illegible]

fól. 80] Question no. 25

List of Publications Joseph H. Gyrt, M.D.,Ph.D.
c o Leyendecker, Box 37, Pelham, N.Y.

Monograph: Body Fluids (in Czech), Prague, 1957
Physiologie der Körperflussigkeiten, Gustav Fischer Verlag, Jena, 1958

Original Articles:

1. The Renal-Vascular Shunt, Fed.Proc.11,13,1947.
2. Renal of Post traumatic Anuria, Amer.J.Physiol. 164, 686,1951
3. The Neural Control of Renal Blood Flow, M.D.thesis, Yale,1951
4. The Renal Response to Extrarenal Depletion of the Blood Volume, J.Physiol.116, 307, 1952.
5. Effect of Nervous Stimulation on the Arterio-venous O_2 and CO_2 Differences across the Kidney. Nature, 171,784, 1953.
6. Renal Function in a Head-down Position. J.Physiol. 122,22P,1953.
7. The Development of the Regulation of the Volume and pH of the Extracellular Fluid. Ph.D. thesis, Cambridge, 1953.
8. The Inhibition of Water Diuresis by a Decrease in Blood and Extracellular Fluid Volume. J.Physiol. 124,41P,1954.
9. Cerebral Salt Wasting. Lancet, i, 752, 1954.
10. Central Nervous Control of the Volume of Extracellular Fluid. Physiol.Bohemoslov.4,14,1955.
11. On the Reinforcement of Mercurial Diuresis (in Czech).Cas.lek.ces.94,244,1955.
12. The Effect of Cardiac Oedema on Electrolyte and Water Metabolism. Acta Med.Hungarica 8,347,1955.
13. The Theoretical Basis for the Metabolic Preparation of Patients for Cardiac Surgery (in Czech). Rozhl. chirurg. 35, 124 & 184, 1956.
14. The Pathophysiology of Body Fluids in Anuria (in Czech). Cas.lek.ces. 95,836,1956.

List of Publications Continued

15. The Response of Human Infants to Acidosis, in the press.
16. The Importance of Potassium in Clinical Medicine (in Czech), Cas.lek.ces. 95,833,1956.
17. An Inexpensive Precision Stereotaxic Instrument, J. Physiol. 123, 15P, 1953.
18. The Effect of Denervation, Pituitrin and Varied Cation Concentration Gradients on the Transport of Cations and Water by Kidney Cortex Slices. J. Physiol. 133,287,1956.
19. Concerning the Transport of Alkali Cations by Kidney Cortex Slices. Biophys.Biochim.Acta 23, 321, 1957.
20. The Effect of Temperature on the Transport of Sodium and Potassium in Kidney Cortex Slices. J. Physiol.142,208,1958.
21. Nervous Control of Cations and Water in the Renal Tubules. Proc.Conf.Nervous Control Metabolism and Active Transport, Academy of Sciences, 1956.
22. Potassium in Congestive Heart Failure. Lancet, i. 1202, 1954.
23. The Neural Control of Shivering in the Pig.J.Physiol. 120,115,1953.
24. The Renal Response of Puppies to an Acidosis.J.Physiol. 124,358,1954. [fol. 81]
25. Uterine Electrolytes in Pregnancy and Labour. Lancet i, 718,1957.
26. The Mechanism of Mercurial Preparations on Transport Processes and the Role of Thiol Groups in the Cell Membrane of Renal Tubular Cells. Biochem.J. 67,15,1957.
27. The Effect of Acetylcholine Inhibitors on the Transport of Cations and Water in Kidney Cortex Slices. Collections Czechosl.Chem.Communic. 51,1530,1957.
28. The Transport of 42-K and 86-Rb in Kidney Cortex Slices. The Effect of Varied Concentration Gradients. Nature, 180, 1124.
29. The Effect of Pituitary and Adrenal Hormones on the Metabolism of Potassium. J.Clin.Invest. 30,673, 1951.

30. The Role of Sodium Salts and Adrenal Steroids in the Production of Hypokalemic Alkalosis. Yale J. Biol.& Med. 23:229,1950 and in "Essays in Metabolism", Little, Brown & Co., Boston, 1950.
31. The Effects of Pituitary and Adrenal Hormones on the Metabolism of Sodium and Water. J.Clin.Invest. 30:682,1951.
32. Operations on the Heart. Lancet, 153, 1955.
33. A New Stereotaxic Instrument for the Precise Localisation of Points in the Central Nervous System of Rats, Cats, Guinea Pigs and Small Dogs. Physiol. Bohemoslov. 6:530,1957.
34. The Effect of Calcium and Mercury on the Response of Kidney and Muscle Electrolyte Gradients to a Change in Extracellular pH. In the press.

(Fol. 82 *Refer to Application to Issue Hearing Card*

16. I was a member of the Communist Party in New Haven, Connecticut from Dec. 1946 to May 1951 while I was a student at Yale University School of Medicine (with the exception of August 1948 to July 1949 when I was in England). I never held any office in that organization and engaged in purely routine activities such as reading, discussions, meetings and paying dues. I have never advocated the overthrow of the United States Government by force or violence. I terminated my membership and activity in the Communist Party in May, 1951 when I left for Europe. I never joined the Communist Party of any other country and I never rejoined the Communist Party, U. S. A.

34-41. I was called up under the original wartime draft law in 1946, examined, and classified as 4 F. I reregistered under the 1948 law in 1949 and was classified 3 A. I was also registered at Draft Board No. 10, New Haven and on May 25, 1951 under the Doctors Draft Act. I departed from the United States subsequent to such registration for the purpose of carrying out the terms of a fellowship given by the National Foundation for Infantile Paralysis, Inc. for work to be performed by me at the University of

Cambridge, England. This was done only after having secured the advice of Dr. Samuel Harvey, the Yale University Advisor on the Draft.

44. On December 17, 1954, a grand jury in the United States District Court, District of Massachusetts, filed an indictment, Criminal no. 54-382-F, charging me with a violation of 50 App., U.S. Code, par. 462 and 12(a) of the Selective Service Act of 1948, as amended, for having failed to report for induction into the Armed Forces of the United States. This indictment is still pending. During the past four months my legal counsel and my wife have met with representatives of the Department of Justice, the Selective Service Administration, and the Department of State for the purpose of facilitating my return to the United States, my performance of all obligations under the Selective Service laws, and the dismissal of the said indictment.

51. The official transcripts of grades have already been requested and will be transmitted directly to you by the appropriate academic authorities.

s/ Joseph H. Cort

RECORD OF INDUCTION

Local Board No 25
Norfolk County
34 Marion St
Brookline, Mass.

CORT JOSEPH

% Hartington Grove, Cambridge, England

27 Dec. 1927

Research, Pediatric Physiology

Pre-Clin. Physiol. Medicine

M.D.

Boston, Mass.

SECTION II - LOCAL BOARD MEDICAL INTERVIEW

Residual poliomyelitis, residual tuberculosis, dangerous allergy, mental apathy

DD FORM 47

[fol. 84] PLAINTIFF'S EXHIBIT C

[STAT.] 221 Cort, Joseph H.
nac

THE FOREIGN SERVICE OF THE
UNITED STATES OF AMERICA

Address Official Communications to
American Embassy
1 Grosvenor Square, London, W.1.

November 28, 1951.

Mr. Joseph H. Cort,
54 Granchester Meadows,
Cambridge.

Sir:

In view of an instruction which has been received from the Department of State in Washington, you are requested to call at the Embassy at your first convenience. Please bring your passport when you call.

This office is open for business Monday through Friday between the hours of 9:00 a.m. and 5:30 p.m., holidays excepted.

Very truly yours,

s Walter M. Walsh
WALTER M. WALSH
American Vice Consul

[fol. 85] PLAINTIFF'S EXHIBIT D

[STAMP] 221 Cort, Joseph H.
mac

THE FOREIGN SERVICE OF THE
UNITED STATES OF AMERICA

Address Official Communications to
American Embassy
1 Grosvenor Square, London, W.1.

December 10, 1951.

Mr. Joseph H. Cort,
54 Granchester Meadows,
Cambridge.

Sir:

Thank you for your letter of December 6, 1951.

You were requested to call as the Embassy has received instructions from the Department of State that your passport should be held at the office and made valid only for return to the United States when you have completed arrangements for the journey. In these circumstances, it would be appreciated if you will call with your passport or forward it by mail at your first convenience.

Very truly yours,

/s/ Walter M. Walsh
WALTER M. WALSH
American Vice Consul

[fol. 86] PLAINTIFF'S EXHIBIT E

[SEAL] 221 Cort, Joseph H.
nac

THE FOREIGN SERVICE OF THE
UNITED STATES OF AMERICA

Address Official Communications to
American Embassy
1 Grosvenor Square, London, W.1.

December 27, 1951.

Mr. Joseph H. Cort,
54 Granchester Meadows,
Cambridge.

Sir:

In reply to your letter of December 14, 1951, I have to inform you that the Embassy was instructed by the Department of State in Washington to take the action communicated to you in my letter of December 10.

If you desire I shall be pleased to see you concerning this matter. You may, of course, execute any affidavit you may wish in regard to the Department's instruction on your case which will be forwarded to Washington. I must, however, request that you bring your passport when you call to be held at this office pending further instructions from Washington.

Very truly yours,

/s/ Walter M. Walsh
WALTER M. WALSH
American Vice Consul

[fol. 87] PLAINTIFF'S EXHIBIT F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 54382 F

UNITED STATES OF AMERICA

v.

JOSEPH HENRY CORT

INDICTMENT

The grand jury charges:

JOSEPH HENRY CORT

formerly of Brookline, in the District of Massachusetts, on or about September 14, 1953, at Brookline, in said District, being a person charged with the duty of carrying out the provisions of Selective Service Act of 1948, as amended, (Title 50 App., U.S.C. Sections 451-470) and the rules and regulations made thereunder, did knowingly fail and neglect to perform such duty in that he unlawfully and knowingly failed and neglected to report for induction into the Armed Forces of the United States, as ordered by Local Board No. 25, Brookline, Norfolk County, Massachusetts; in violation of Title 50 App., United States Code, Section 462 and Section 12(a) of the Selective Service Act of 1948, as amended.

[fol. 88] A TRUE BILL

/s/ Everett L. Bunker
Foreman of the Grand Jury

/s/ Thomas P. O'Connor
Assistant United States Attorney

[fol. 89] DISTRICT OF MASSACHUSETTS, December 17, 1954
Returned into the District Court by the Grand Jurors and filed

/s/ David W. Walsh, Jr.
Deputy Clerk

[fol. 90] PLAINTIFF'S EXHIBIT G

RABINOWITZ & BOUDIN
Attorneys at Law
25 Broad Street
New York 4, N. Y.

July 27, 1959

Lieut. General Lewis B. Hershey
Director, Selective Service System
451 Indiana Avenue N.W.
Washington, D. C.

Dear General Hershey:

I write you with respect to my client, Dr. Joseph Cort, who was the subject of a discussion on July 23rd between Major Alexander Nuta, Assistant General Counsel of the Selective Service System, Mrs. Ruth Cort, the wife of Dr. Cort, and myself.

Dr. Cort is an American citizen by birth. He was indicted on December 17, 1954 by a Grand Jury of the United States District Court for the District of Massachusetts on the charge of having failed to report for induction into the Armed Forces of the United States on September 14, 1953 as ordered by Local Board No. 25, Brookline, Norfolk County Massachusetts, in violation of § 12 a of the Selective Service Act of 1948, as amended.

Dr. Cort had registered in New Haven, Connecticut under the Selective Service Act; he was declared 4-F on the basis of residual poliomyelitis. Thereafter, in May 1951, he registered under the Doctor's Draft Act prior to the effective registration date because he was to leave for Cambridge University, England where he had been given a fellowship in the field of physiology. He was advised by the New Haven Draft Board and by the Yale University Advisor for the draft that there was not as yet any machinery for giving doctors permission to leave but that he could take up his Cambridge position. He did so and subsequently became a lecturer in physiology at the University of Birmingham.

While in England he received notices to report for physical examination and then for induction at Brookline, Massachusetts. He did not respond to these notices for the following reasons: On November 28, 1951 shortly after his arrival in England the American Embassy demanded his passport; subsequently, it expired. Then Dr. Cort's name was mentioned in hearings conducted by the House Committee on Un-American Activities in connection with [fol. 91] its enquiries into Communism in Education. These facts and others either peculiar to Dr. Cort or occurring generally in the United States during this period, suggested that Dr. Cort's return to the United States might be followed by an appearance before Congressional Committees and other discriminatory treatment unrelated to the fulfillment of his obligations under the Selective Service laws. He consulted British counsel who advised him that the notices referred to could not be effectively served in Great Britain.

He thereupon remained in England until 1954 when the Home Office declined to permit him to remain in view of Dr. Cort's status under American law. He thereupon accepted an offer by the Institute for Cardiovascular diseases in Prague to continue research on those subjects and left with his family for Prague where he is still resident.

The occasion for my visit to your office was Dr. Cort's desire to return to the United States for permanent residence, and employment here, for the fulfillment of his obligations under the Selective Service laws and for the disposal of the criminal indictment against him.

The principal reason for this desire is that this is his country. His children, aged 2 and 4, are registered at the American Embassy in Prague as American citizens; his wife is an American citizen by birth.

There is another most important reason relating to Mrs. Cort's health. She has been suffering for several years from a serious illness diagnosed in Europe as Multiple Sclerosis. She has been treated medically in the United States for the last month. It is important, possibly

critical, that she continue to receive medical care in the United States. But she can not continue to remain separated from her husband and children.

It is our earnest hope that you would personally look into this matter and consider processing Dr. Cort for induction and a recommendation to the Department of Justice that in accordance with practice—although not an [fol. 92] invariable one—it dismiss the pending indictment. The humanitarian factor, rather than legal ones, seem to me most moving—a wife and mother compelled to choose between adequate medical care and return to husband and children. However, I should not wish to disregard the bona fides of Dr. Cort. While time has shown his conduct to have been unwise—and American counsel would undoubtedly have advised otherwise, he was moved by not insubstantial fears by reason of the situation prevailing in the United States in 1953 and 1954. Finally as a leading physiologist he can make a very real contribution to this country's welfare whether he is in the armed forces, the Public Health Service or in an American University. The enclosed Curriculum Vitae and list of publications attest to this fact.

I should very much appreciate if you could give Mrs. Cort and me the opportunity to discuss this matter with you personally.

Sincerely yours,

Leonard B. Borgin

SM

[fol. 93] PLAINTIFF'S EXHIBIT H

RABINOWITZ & BOUDIN
Attorneys at Law
25 Broad Street
New York 4, N. Y.

July 31, 1959

Major Alexander Nuta
Assistant General Counsel,
Selective Service Administration
Washington, D. C.

Dear Major Nuta:

I omitted to tell you in our brief telephone conversation of today that Mrs. Cort has pursued the alternate line which we discussed, *viz.*, the possibility of employment with the Public Health Service. She visited its offices in New York today and consulted at length with the medical officer in charge of recruitment. It appeared from that discussion that Dr. Cort could apply for an internship which could not take effect until July 1960; that the internship would be in effect for one year; and that it might then be followed by an application for a commission in the Public Health Service, such second employment being for a period of not less than two years.

Of course, we do not wish to take any steps except those which would constitute or lead to compliance with Dr. Cort's obligations under the Selective Service Act. For while such Public Health Service work was discussed by Mrs. Cort and by me in our discussion with you, it may be that compliance with the Selective Service Law requires at the very minimum availability for processing for induction into the Armed Forces. These are matters for your decision rather than for ours. I mention them to bring you up to date on the course of our own investigation, and to suggest again the possibility that this may justify a discussion with General Hershey himself before Mrs. Cort leaves for Czechoslovakia. However, in any event, *i.e.* whether or not such a meeting can be had

our conduct in this matter would of necessity have to be guided by your office.

[fol. 94] It occurs to me that we might simultaneously make application to the Public Health Service and make Dr. Cort available for processing for induction so that a determination could be made by the government as to the branch of government service in which he might make the greatest contribution. It is my own view, based upon knowledge of the facts now in my possession, and although service with the Public Health Service would be for a period of at least three years as against two years Army service, Dr. Cort could make a greater contribution in the former rather than the latter. In other words, the internship in the Public Health Service would involve full utilization of his medical training, whereas Army service might very well not.

Sincerely yours,

Leonard B. Boudin

LBB:bk

[fol. 95] PLAINTIFF'S EXHIBIT K

RABINOWITZ & BOUDIN
Attorneys at Law
25 Broad Street
New York 4, N. Y.

October 9, 1959

Colonel Daniel O. Omer, General
Counsel
Selective Service System
451 Indiana Avenue, N.W.
Washington, D. C.

Re: Dr. Joseph Cort

Dear Colonel Omer:

Supplementing my letter of September 30, 1959, may I advise you as follows:

(a) I have transmitted on behalf of Dr. Cort a fully executed application for appointment as a Commissioned Officer in the United States Public Health Service, as indicated by my enclosed letter of October 6, 1959 to Dr. Harald M. Graning. It would be appreciated if you would transmit this letter to Dr. Cort's Local Board for inclusion in his cover sheet.

(b) I am advised today that the Department of State has written you a letter requesting your advice, as indicated in paragraph fourth of my letter to you of September 30, 1959. I should very much appreciate it if you were able to advise the Department of State as early as possible of your views, and if you were able, to send me a copy of your letter to the Department.

(c) In addition to the application for employment in the United States Public Health Service, Dr. Cort on September 3, 1959 communicated with the Chief, Officer Procurement Program, Personnel Division, Office of the Surgeon, Headquarters First United States Army, inquiring whether he could submit an

After consulting with British legal counsel, I did remain outside the jurisdiction of the United States following the issuance by a Local Selective Service Board of certain orders to report for physical examination and induction. However, the purpose of my remaining outside the United States was not for the purpose of avoiding training and service in the Armed Forces of the United States in time of war or a period declared by the President to be a period of national emergency within the meaning of 8 U.S.C. Section 1481 (a) (10).

At the present time and for the last three months my legal counsel and my wife have met with representatives of the Department of Justice, the Selective Service Administration and the Department of State for the purpose of facilitating my return to the United States and my performance of all obligations under the Selective Service Laws. I desire to return to the United States for those express purposes. Completion of these arrangements requires my physical presence in the United States for which a passport is necessarily a condition. This return should be as soon as possible, since I have to be in the United States to complete formalities of applying for a service internship before December 1, 1959, and require a passport number in order to negotiate for an exit permit from Czechoslovakia.

application for a United States Army internship. I have not as yet been advised of the Army's response to this letter; presumably, if it is in the affirmative, Dr. Cort would also apply for such an internship. [fol. 96] I shall, of course, keep your office, and through it the local Selective Service Board, acquainted with the developments here.

However, I am concerned about one remaining aspect as to which I am not quite clear, *i.e.*, the third alternative of applying to his Local Board for induction. I have the impression, although I have no supporting memorandum in my files, that this should not be done at the present stage of the proceedings. However, because I am not sure that my memory is correct, may I inquire whether at the present stage, namely, the pendency of the indictment, it would be proper or practicable for Dr. Cort to apply to his local Board for consideration for induction? If this can or should be done, could you tell me the mechanics, namely, should he physically appear at the Board and present himself to the Clerk or should he write to the Board itself for an appointment, or should I write to the Board in this connection?

It may be that in view of the applications for internships referred to above and the pendency of the indictment, action upon the third alternative suggested here should be withheld for the moment. I am, however, writing you in order to be sure that we have not overlooked something which may turn out to be important.

Sincerely yours,

LEONARD B. BOUDIN

LBB:se

[fol. 97] PLAINTIFF'S EXHIBIT L

[SEAL] NATIONAL HEADQUARTERS
Office of the Director
SELECTIVE SERVICE SYSTEM
451 Indiana Avenue Northwest
Washington 25, D. C.

Address Reply to
The Director of Selective Service

Mr. Leonard B. Boudin
Attorney at Law
25 Broad Street
New York 4, New York

Oct 16 1959

Subject: Joseph H. Cort
SS No. 19-25-27-408

Dear Mr. Boudin:

This is in reply to your letter of October 9, 1959, inquiring whether it would be proper or practicable for Dr. Cort to apply at this time at his local board for consideration for induction.

Dr. Cort is, of course, at liberty to submit any written information or statements he may desire to his local board including a request that he be considered for induction. However, since he has been a delinquent since 1953 and has been indicted for this delinquency, further Selective Service processing would not be appropriate inasmuch as the entire matter is now in the hands of the United States Attorney.

You further requested in your letter that, if possible, you be sent a copy of our reply to an inquiry from the Department of State. A reply to the Department of State has been prepared, but any release of the content of this letter must be by that Department.

For The Director,

/s/ Daniel O. Omer
DANIEL O. OMER
Colonel, JAGC
General Counsel

[fol. 98] PLAINTIFF'S EXHIBIT M

COPY

Prague, Czechoslovakia

October 27th, 1959

General L. B. Hershey
Selective Service Administration
Washington, D. C.

Dear General Hershey,

I wonder if you recall a visit last summer from myself and my legal counsel, Mr. Leonard B. Boudin. In company with Colonel Omer, we had a long and detailed discussion dealing the situation of my husband, Dr. Joseph H. Cort. You were at that time reluctant to make any commitment concerning your future attitude towards my husband's efforts to return to the United States, with a view to fulfilling his service requirements and thereby removing the grounds for an indictment for draft evasion.

I believe that I did not misinterpret your attitude that efforts to serve in any capacity, preferably professional, would be evidence of good faith on his part.

Colonel Omer, on the other hand, subsequently expressed to us his candid opposition to any leniency, legal or otherwise, on the grounds that we had deliberately impugned the good name of our country. He said, however, that in your absence he would be guided by your wishes in the matter.

In the interim, after obtaining as much information as possible concerning professional requirements, my husband has applied for internship in the Public Health Service, and has corresponded with Major de Graaf, Office of the Surgeon General, U.S. Army, Governors Island, N. Y., in an effort to apply for an army internship, for which he [fol. 99] is overage. You may recall that, not having completed an internship, my husband is not qualified for medical service in any government branch. Since the deadline for government internship applications is December 1st, we had planned to return home by the beginning

[fol. 107] PLAINTIFF'S EXHIBIT BB



of November. Other internship applications can be made up to January 1st.

Having made all preparations to leave, informed our parents, etc., we now find that the Passport Office of the State Department refuses to issue a passport to my husband on the grounds that, under the McCarran Act, he has expatriated himself by willful draft evasion. In this decision they were apparently influenced by the strong personal recommendation of Colonel Omer.

You may perhaps appreciate the difficulty of our position and our chagrin. Having expended considerable effort in making good faith attempts to serve internships, and in preparing to transport a household including two small children, we now find the path home blocked, and partially through the offices of Colonel Omer.

I can only speculate on the motivation of such a vindictive attitude. It is quite true that there was considerable publicity in England in the spring of 1961, and that wide sections of political opinion kept upon the "Croft case" with cries of joy. This was surely a product of the political atmosphere prevailing in England at the time, which was not of our making. Was it mentioned [fol. 100] during our conversation that three months of utterly private intercession by the Vice-Chancellor of Birmingham University, as well as very prominent scientists and members of parliament, proved fruitless to the eruption of our "case" into the newspapers?

On the other hand, are we to pretend that the phenomena commonly known as "McCarthyism" never existed, and that punitive measures against communists, former communists, and "punks" of all description were never taken inside the Army as well as out?

I hope you will take the time to consider our situation dispassionately, for the future of not one, but four, Americans is involved.

Yours sincerely,

/s/ Ruth Cort
Ruth M. Cort, M.D.

[fol. 101] PLAINTIFF'S EXHIBIT Z

Form Approved
Budget Bureau No. 47-R115

REGISTRATION APPROVED

DEPARTMENT OF STATE
FOREIGN SERVICE OF THE
UNITED STATES OF AMERICA
Application for Passport
~~Application for Registration~~
(FORM FOR NATIVE CITIZEN)

PASSPORT ISSUED

Joseph Henry Court (name in full) a NATIVE citizen of the United States, solemnly swear that I was born at Boston (city or town) Massachusetts (State or country) on or about December 27, 1927 (date); that I am now residing at 3 Na Sypcine, Prague 15, Czechoslovakia (give present address in full); that I resided in the United States from 1927 to 1951 at Boston and Brookline and Cambridge, Mass., New Haven, Connecticut (except stay in Czechoslovakia 1948 - 1949); and that I have resided outside the United States as follows:

(State names of and period of residence in each foreign country; each shall be any foreign country, regardless of duration, unless so stated)

Cambridge, Mass. and Cambridge and Birmingham, England	from	September 1948	to	June 1949
	"	June 2, 1951	"	July 30, 1954
Prague, Czechoslovakia	from	August 8, 1954	to	present date

My legal residence is at 161 York Street, New Haven, Connecticut

and I intend to return to the United States to reside permanently within six months

I was ~~discharged~~ married on August 20, 1949 at Mamaroneck, N. Y. to Ruth Mathilde Leyendecker

who was born at New York, New York on July 30, 1925 is (a ~~citizen~~ national) an American citizen

and is now residing at Prague, Czechoslovakia (with me)

My father, Boris Jurt (name in full) was born at Zhitomir Russia (city or town) (State or country)

on about 1894 and is now residing at 576 Washington Street, Brookline 46, Mass.

My mother, Eva Kolidicka Collins (maiden name) was born at Brest Litovsk Russia (city or town) (State or country)

on about 1896 and is now residing at 576 Washington Street, Brookline 46, Mass.

(IF EITHER PARENT WAS BORN OUTSIDE THE UNITED STATES, FILL IN THIS PORTION)

My father immigrated to the United States on or about 1916 resided continuously

in the United States from 1916 to 1959 at Boston and Brookline, Mass. and was naturalized as a

citizen of the United States before the unknown (name of court) Court of

at (city or town) on (Month) (Day) (Year)?

My mother immigrated to the United States on or about 1916 resided continuously

in the United States from 1916 to 1959 at Boston and Brookline, Mass. and was naturalized as a

citizen of the United States before the unknown (name of court) Court of

at (city or town) on (Month) (Day) (Year)?

I request the inclusion of my wife

(name in full)

She accompanies me on this application

I request the inclusion of my minor children as follows:

(name in full) at (city or town and State or country) on (date)

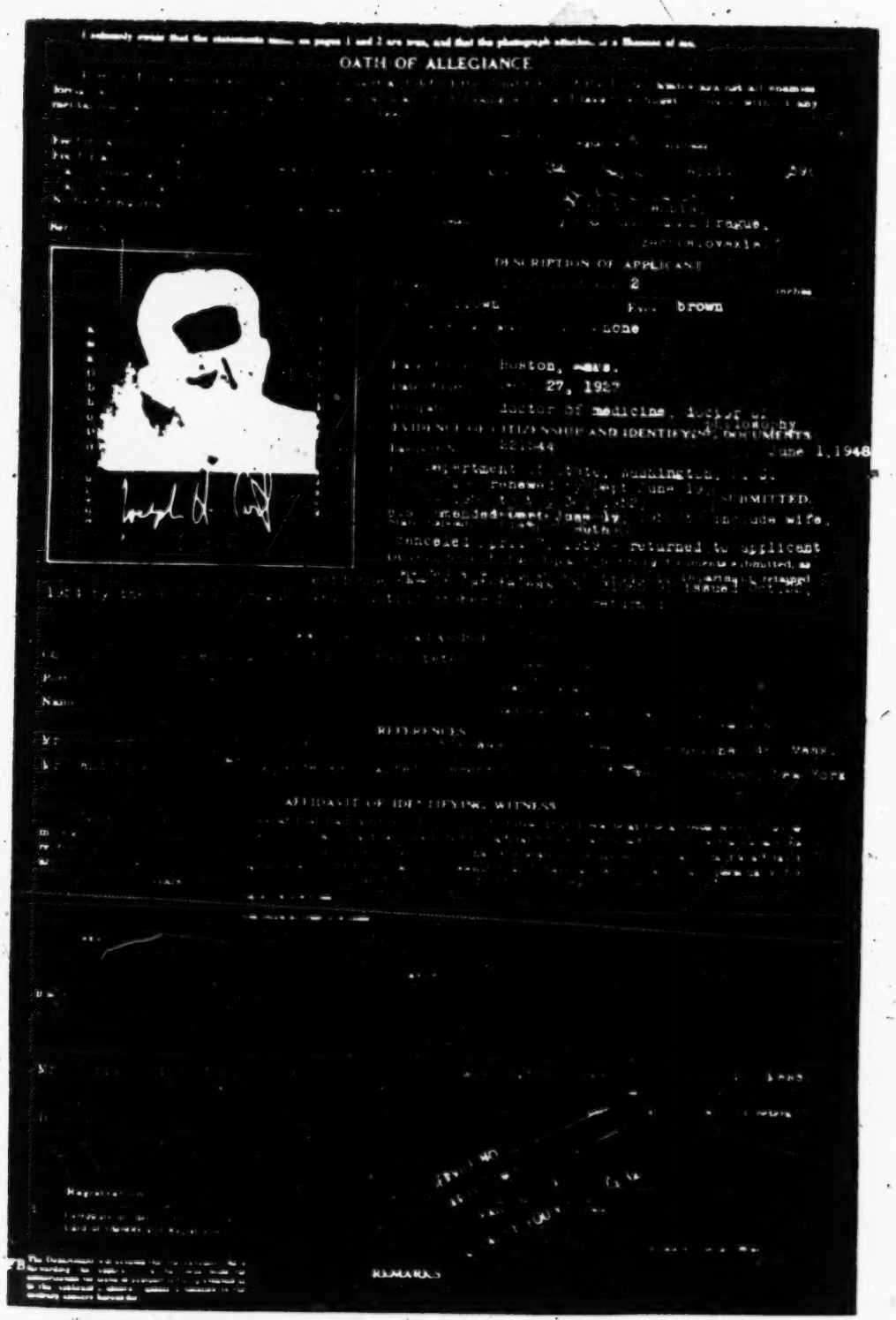
(name in full) at (city or town) on (date)

(name in full) at (city or town) on (date)

I HEREBY

Applying for registration

[fol. 102]



OATH OF ALLEGIANCE

DESCRIPTION OF APPLICANT

2

brown

None

Boston, Mass.

27, 1927

Doctor of Medicine

June 1,1948

returned to applicant

REFERENCES

AFFIDAVIT OF IDENTIFYING WITNESS

REMARKS

[fol. 103]

Form FS-419
(Effective April 1, 1951)

DEPARTMENT OF STATE
FOREIGN SERVICE OF THE UNITED STATES OF AMERICA

Form approved
Budget Bureau No. 44-R

AFFIDAVIT BY NATIVE OR NATURALIZED AMERICAN TO EXPLAIN PROTRACTED FOREIGN RESIDENCE

This form should be used by any native or naturalized American citizen who has resided abroad for two years or more. However, in cases where form 21 is used, this form need not be used.

The form must be used by a naturalized citizen who has resided for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated. It must also be used by a naturalized citizen who has resided continuously for five years in any other foreign state or states. In cases of naturalized citizens the exact periods and places of foreign residence since naturalization should be stated.

This form must always accompany applications for extension of passports which have been expressly limited as to validity.

As many copies of this form should be made out as of the application for registration or passport which it accompanies and should be firmly attached thereto.

I, Joseph Henry CORT, a native American citizen, born at Boston, Massachusetts (County), do solemnly swear that I departed from the United States on or about May 29, 1951, that I have since resided at Cambridge and Birmingham (England) and Prague (Czechoslovakia) (Countries), and that I arrived at Prague, Czechoslovakia (City and country), where I am now permanently residing, on August 8, 1951.

My reasons for such foreign residence being as follows: See attached Affidavit and Supplementary Statement.

I have previously taken an oath of allegiance to the United States before a United States diplomatic or consular officer at .....

Since establishing a residence abroad I have made the following visits to the United States:

From ..... 19 .. to ..... 19 .. From ..... 19 .. to ..... 19 ..

From ..... 19 .. to ..... 19 .. From ..... 19 .. to ..... 19 ..

I have not been naturalized as a citizen of a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered or served in, the armed forces of a foreign state; accepted or performed the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof; voted in a political election in a foreign state or participated in an election or plebiscite to determine sovereignty over foreign territory; made a formal renunciation of nationality either in the United States or before a diplomatic or consular officer of the United States in a foreign state; been convicted by court martial of desertion from the military, air, or naval service of the United States in time of war, or of committing any act of treason against, or of attempting by force to overthrow, or of bearing arms against the United States, or deserted from or remained outside the jurisdiction of the United States for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

If any of the above-mentioned acts or conditions are applicable to the applicant's case, or to the case of any other person included in this application, a supplementary statement under oath should be attached and made a part hereof.

I maintain the following ties of family, business, and property with the United States:

Mr. and Mrs. Boris Cort, parents, 576 Washington Street, Brookline, 46, Mass.
Mrs. and Mrs. Robert K. Leyendecker, parents-in-law, 1073 Grant Ave., Pelham, N. Y.

I have served in the armed forces of the United States during the following periods:

I (do / do not) pay the American Income Tax at .....

I intend to return to the United States permanently to reside within six (months / years) or when .....

I have (read / had read to me) in the English (Italian, Greek, Spanish, etc.) language the contents of this form and I swear that I understand the statements contained herein.

(Signature of applicant)

3 Na Sypcime, Prague 15, Czechoslovakia
(Address)

AMERICAN FOREIGN SERVICE AT Prague, Czechoslovakia.

Sworn to before me this 24th day of August 1951.

(Seal)

John M. Dennis,
Consul
of the United States of America

(SEE INSTRUCTIONS PRINTED ON REVERSE SIDE)

[illegible] will indicate whether the above is an affiant's independent statement. If not, officer should state whether or not affiant's statement has been translated from a foreign language. This statement should be in ink and initialed by persons.

[Fol. 104] OPINION OF OFFICER TAKING AFFIDAVIT

The officer before whom the affidavit is made should see that the pertinent facts and circumstances regarding the applicant's residence abroad are fully and correctly set forth in the affidavit and application. If, for any reason, they are not so stated, the officer should complete them in the space below, adding such comment or opinion as is appropriate. He should state whether the facts recited constitute the true reason for such residence. He should also state his opinion, in each case, whether the applicant has abandoned his allegiance and ties with the United States and so shaped his plans as to render it improbable that he will return to the United States to reside and perform the duties of a citizen and whether he has lost his American citizenship under any of the provisions of the Nationality Act of 1940 or the Immigration and Nationality Act, effective December 24, 1952. He should date the opinion, sign his name, and add his title below the statement of his opinion.

The officer who signs this side of the form need not necessarily be the officer who signs the front side, provided that he has interviewed the applicant or is otherwise in full possession of the facts in the case.

Reference is made to the Department's Confidential Operations Memorandum of February 25, 1959.

Dr. Court said his wife, Dr. Ruth Mathilde Court, to whom the Embassy issued passport No. 45298 on May 5, 1959, recently spoke with officials in the legal section of the Passport Office who are familiar with this case. Without evidence to the contrary, the consular officer has no reason to doubt Dr. Court's statements made in the attached affidavit which purports to answer the charge that he departed from and remained outside the jurisdiction of the United States for the purpose of evading or avoiding training and service in the armed forces of the United States.

John Dennis
John M. Dennis,
Consul of the United States
of America

Prague, Czechoslovakia,
August 24, 1959.

[fol. 405] AFFIDAVIT

REPUBLIC OF CZECHOSLOVAKIA)
CITY OF PRAGUE) ss:
EMBASSY OF THE UNITED STATES)
OF AMERICA, CONSULAR SECTION)

Before me, John M. Dennis, Consul of the United States of America at Prague, Czechoslovakia, duly commissioned and qualified, personally appeared the undersigned who, being duly sworn, deposes and says as follows:

"My name is Joseph Henry Cort
and I reside at 3 Na Sypeine, Prague 15,
Czechoslovakia

I last left the United States in June 1951, and have since resided at 54 Grant Chester Meadows, Cambridge, England and 10 West Hill Road, King's Norton, Birmingham, England, from June 1951 until July 1954, and at Prague, Czechoslovakia, since August 1954 till the present date.

Before leaving the United States, I registered on May 25, 1951 with the Local Board at New Haven, Connecticut, under the Selective Service Act of 1948. I notified that Board on the same day that I was about to proceed to England for the purpose of reasearch fellowship in England.

I received letters from Brookline, Mass., ordering me to report for physical examination in February 1953, then on July 1, 1953, and again in July 1953, and for induction on September 14, 1953. I was not aware of the fact that I was reported delinquent for failure to report as ordered; I also was not aware of the provisions of Section 349(a) (10) of the Immigration and Nationality Act of 1952.

I submit the following *attached* supplementary explanatory statement:

And further deponent saith not.

/s/ J. H. Cort
(signature of affiant)

Subscribed and sworn to before me this 24th day of August 1959.

/s/ John Dennis
(SEAL) JOHN M. DENNIS,
Consul of the United States
of America

[fol. 106] SUPPLEMENTARY
EXPLANATORY STATEMENT

Because it may be asserted that the matters above stricken are applicable, although I do not concur, I have followed the Department's instructions, stricken the said matter and added this supplementary statement.

I have been employed from 1954 to date by the Institute for Cardiovascular Research, an organization under the jurisdiction of the Ministry of Health in Prague, Czechoslovakia. I have not, however, acquired Czechoslovak nationality or citizenship, nor was an oath, affirmation or declaration of allegiance required of me or made by me in connection with such employment. Therefore, 8 U.S.C. Section 1481 (4) is inapplicable.

I departed from the United States in May 1951, for the purpose of carrying out the terms of a fellowship given by the National Foundation for Infantile Paralysis, Inc., an American corporation, for work to be performed by me at the University of Cambridge, England. I departed from the United States after having secured the advise of the Yale University advisor on the draft, Dr. Samuel Harvey, that this departure was lawful, and after having registered prior to the effective date under the Doctors' Draft Act in New Haven, Conn. I remained in England from 1951 to 1954, for the purpose of carrying out the terms of that fellowship, which was renewed for an additional year, and subsequently for the purpose of accepting the position of and carrying out my duties as a lecturer in physiology at the University of Birmingham, England. In 1954, I traveled to Czechoslovakia for the purpose of securing the employment first above named.

[fol. 108] PLAINTIFF'S EXHIBIT CC

Correspondence

Prague, Czechoslovakia, October 23, 1959

AFFIDAVIT

I, Dr. Joseph Henry Cort, make the following statement in connection with my application for a passport to return to the United States of America:

1. I left the United States on May 29th, 1951 for the sole purpose of fulfilling the terms of a research fellowship granted to me by the National Foundation for Infantile Paralysis, Inc. for research work in the Department of Experimental Medicine, Cambridge, England, such a post being of great advantage for my scientific career. There was no desire whatsoever to make myself unavailable for military service, as evidenced by the fact that I registered on May 25th, 1951 for the Doctors Draft, almost two weeks before the due date of registration, and was informed at that time that I could leave the country to undertake the abovementioned post.

2. In 1952 I remained in England after the expiration of my passport because I felt that the fact that the State Department had demanded the return of my passport would affect possibilities of scientific employment at that time in the United States.

3. In 1953 I received several notices to report for examination, and then induction, in the draft. I did not so report for the following reasons:

a) since I had been a member of the American Communist Party while a medical student at Yale University, and had been mentioned as such several times in the hearings of the House Un-American Activities Committee, it appeared that U.S.Army policy at that period would prevent my serving as a doctor in the army since I doubted that I could be granted a commission.

b) since I had been classified 4-F by Selective Service in 1946, I felt that it would not even be possible to serve in a non-professional capacity.

c) since I fully expected that actual army service would not be possible, and since I was not in possession of a valid passport at that time, to have responded to the notices to report for either examination or induction would have meant returning to the United States and leaving very satisfactory employment as a lecturer in Physiology at a time when return to this employment would not have been possible, and when I was afraid of the possibility of further Un-American Activities Committee hearings and possible prosecution under the Smith Act.

d) I was not aware of the possible consequences of this under American law.

4. In 1954 I came to Czechoslovakia because I felt that the wide publicity which upon renewal of my permission to stay in England had received in that country would most seriously affect my employability and the dangers mentioned in 3 c above in the United States at that time. From 1955 to 1959 my return to the U.S. was not conceivable to me due to the serious illness of my wife, so that I could not transport two very small children and an ill wife from hospital in Prague to the U.S.

[fol. 109] 5. I wish to stress that at no time from 1951 to the present has there been any desire on my part to evade my obligations to perform military service for the United States, nor has any action of mine been so motivated. My failure to respond in 1953 was due only to a conviction that actual military service for me in any capacity at that time was not actually possible, and that my return to the United States at that time would only involve me in congressional committee hearings, possible Smith Act prosecution, and unemployment as a scientist. I am willing at present, as I have been in the past period, to carry out my military service obligations, and wish to return to the United States at the present time for this purpose.

s/ Joseph H. Cort
Joseph Henry Cort, M.D. Yale, Ph.D. Cambridge

[fol. 110] PLAINTIFF'S EXHIBIT EE

Prague, Czechoslovakia, November 2nd, 1959

STATEMENT

My application for a passport is now in the stage of departmental appeal after the decision of the passport section of the Department of State that, having expatriated myself, a passport can no longer be granted. In connection with these appeal hearings I feel that I should offer a further statement, and in so doing, explain why such a statement has not been made previously. I have realised from the outset of the present negotiations that the lack of a frank and open statement from myself to the Department of State might be construed as indicating an arrogant and recalcitrant attitude. If so, this is not true. Despite my own inclination and the advice of the United States Consul in Prague at that time, I did not previously make such a statement because my affairs in the United States were in the hands of legal counsel and I felt that no statement should be made without consultation—which consultation is very difficult by mail in the present case. Furthermore, on the basis of legal consultations and discussions held by my wife while she was in the United States this past summer, I was under the impression that if strenuous bona fide attempts were made to fulfill service requirements, my return to the United States to implement this compliance would not constitute a serious problem. I believed that with clear evidence of sincerity of purpose, my citizenship would not be called into question.

My wife was in the United States for a period of ten weeks this past summer. The purposes of this visit were her urgent need for expert medical consultation, her desire to see her aged father, and as far as possible to expedite arrangements for our permanent return home. In conversations at the Department of Justice in Washington, it was indicated to her that in cases of alleged draft evasion the Justice Department was primarily interested in securing compliance with selective service laws.

She then visited the Selective Service Administration to determine what would, in their opinion, constitute compliance in my case. This was necessary because of several complicating factors, i.e. that I am over age for regular military service, and since I have not completed an internship in the United States I am ineligible for immediate induction for service as a physician.

In a long conversation with General Hershey, in the presence of Colonel D. Omer and Mr. L. Boudin, the General indicated that attempts to acquire eligibility for service as a physician (in the armed forces or the Public Health Service) would be clear evidence of desire to comply with Selective Service requirements. General Hershey suggested that in the first instance application for internship in the military and Public Health Services be made. [fol. 111] Failing these, private internship applications should be the next step, in preparation for actual service in the next year. He considered attempts to serve professionally entirely appropriate and acceptable. Application for service in a non-eliminent security capacity was not discussed. General Hershey would not, of course, commit himself to any recommendation to the Department of Justice until my physical presence in the United States gave concrete evidence of my sincerity of purpose.

Accordingly, upon my wife's return to Prague with this information, I have attempted to follow General Hershey's advice with the following steps: 1. application for a passport to return home, 2. application for cancellation of permission to stay in Czechoslovakia and permission to leave for the United States, 3. application completed as far as possible outside of the United States for an internship in the United States Public Health Service, 4. correspondence with the Surgeon General's Office in New York City about application for an Army internship, which step can only be made in the United States since army regulations prohibit the sending of the appropriate forms outside of the United States, 5. the rapid winding up of all personal and financial matters in Czechoslovakia.

Following the above mentioned interview, Colonel Omer stated explicitly to my wife and Mr. Boudin that, although he disagreed with General Hershey's views, he

would feel bound to respect them in the Generals' absence. I am now led to believe that, when Colonel Omer was asked for his opinion by the passport section of the Department of State, he expressed his own views rather than those of General Hershey.

My legal counsel has by this time submitted a statement from me primarily pertaining to the legal bases of passport refusal, but I feel that some further elaboration is pertinent to my appeal, and in particular should include comments on the period 1953-1954.

In this period I was not aware of the possible consequences of non-compliance with Selective Service directives, although I realize that ignorance is not a mitigating circumstance in the eyes of the law. I was aware only of the disastrous consequences to my professional life of abandoning an excellent teaching position, and therefore sought to safeguard this position through private professional intercession to the Home Office over a period of three months, including the intervention of a member of parliament. The consequent widespread attention in the British press to this matter was not on my instigation, nor was it my purpose to utilize notoriety to slander my country. When asked for comment on discriminatory measures taken against left wing physicians in the United States at that time, I frankly said that I believed that [fol. 112] they were wrong. I would do so again.

My wife and I took political asylum in Czechoslovakia because we feared severe penalties under the law and by further press publicity if we returned to the United States at that time—immediately after widespread publicity in England. Such would be both ruinous professionally and cause great suffering to our families. We have come to feel that this decision was a serious mistake on our part.

I am aware that the opinion may be held that just retribution should be exacted for apparent refusal to serve, and causing embarrassment to, one's country. I can only comment that over five years of exile is a punishment the severity of which cannot be judged by persons who have not experienced it.

I therefore appeal for the opportunity to return to [illegible] as a native-born American citizen, in order to fulfill my citizen's obligations. We wish to rear our children as Americans in America. I appeal also on the basis of my wife's [illegible] chronic illness. From the experience of her visit last summer to the United States, we have every reason to believe that return home would afford her at least partial recovery.

I am quite aware that we have possible recourse to the courts for clarification of the legal issues involved. We are very reluctant to resort to this because we have no desire to engender further soul-searching, we do not have the necessary financial resources, and we do not wish to visit [illegible] misery upon our families.

Joseph Henry Gort, M.D. Yale, Ph.D. Cambridge

Subscribed and sworn to before me this [illegible] day of November 1958.

SEAL

[illegible] Secretary's [illegible] to the foregoing paper omitted in printing.

[fol. 114] DEFENDANT'S EXHIBIT A

In Reply Refer to: 130—Cort, Joseph Henry

BOARD OF REVIEW
PASSPORT OFFICE

60 2984
February 10, 1960

Dear Mr. Boudin:

Reference is made to my letter of January 18, 1960, concerning the citizenship case of Dr. Joseph H. Cort.

The Board of Review on the Loss of Nationality has given very careful consideration to the appeal of Dr. Cort, but, upon the basis of the record and in the absence of a decision of the Supreme Court regarding the point of law involved, it has affirmed the previous administrative decision that Dr. Cort expatriated himself under the provisions of Section 349(a)(10) of the Immigration and Nationality Act.

As you were informed orally when you first discussed Dr. Cort's case with members of the Board, the Board, in recent months, has generally followed the policy of withholding action in cases involving the application of Section 349(a)(10) as well as Section 401(j) of the Nationality Act of 1940, pending the decision of the Supreme Court in the case of *Mendoza-Martinez v. Macken*. However, in view of your representations concerning the urgency of obtaining a decision in Dr. Cort's case, the Board has acted on his appeal, considering it in advance of its regular turn on the Boards' docket.

The decision in Dr. Corts' case, set forth above, is subject to reconsideration after the Supreme Court renders its decision in the case of *Mendoza-Martinez v. Macken*.

Inasmuch as Dr. Cort has exhausted his other administrative remedies, the Embassy at Prague and the Department are prepared to give prompt consideration to Dr. Cort's request for a certificate of identity upon his execution of a formal application therefor in accordance

with the procedure set forth in 22 CFR 50.24. No record [fol. 115] has been found in the Passport Office of the receipt of such an application.

The Embassy at Pfaffenhofen being advised of the Board's decision and is being instructed to give prompt consideration to any application which Dr. Gort may make for a certificate of identity.

Sincerely,

/s/ Robert D. Johnson
Acting Chairman, Board of Review
on the Loss of Nationality

A true copy of the signed original /s/ HLP

PPT:AJNicholas JECotter:HLP 2/10/60

Mr. Leonard B. Boudin,
Attorney at Law,
25 Broad Street,
New York 4, New York.

[fol. 116] Secretary's Certificate to foregoing paper omitted in printing.

[fol. 117] ——DEFENDANT'S EXHIBIT B

DEPARTMENT OF STATE
THE LEGAL ADVISER

February 8, 1960
60 2979

MEMORANDUM

To: PPT—Mr. Robert D. Johnson

From: L—Eric H. Hager

Subject: Citizenship Case of Dr. Joseph Henry Cort.

Reference is made to your memorandum dated January 19, 1960, concerning the above case, together with the attached copies of correspondence from the files of the Harvard Medical School. We have reviewed that correspondence and believe that with the addition thereof the record now establishes a *prima facie* case that Dr. Cort remained outside the United States for the purpose of avoiding military service.

Unless and until the Supreme Court holds Section 349 (a) (10), of the Immigration and Nationality Act of 1952 unconstitutional, a question which is currently before the Court in *Mendoza-Martinez* v. *Mackey*, I believe the Department should avoid taking action inconsistent with the Solicitor General's argument that the statute is constitutional. Under the circumstances, I believe the Department has no alternative but to hold that Dr. Cort has lost his nationality under the foregoing provision of the statute. However, I suggest that the Department's decision, as communicated to Dr. Cort or his attorney, be so worded that its continued validity will be contingent upon a holding by the Supreme Court in the *Mendoza Martinez* case that the statute is constitutional.

Attachment:

Passport file.

L SFP:WLGriffin:dft

[fol. 118] Secretary's Certificate to foregoing paper omitted in printing.

[fol. 119] DEPARTMENT EXHIBIT C

BOARD OF REVIEW ON THE LOSS OF NATIONALITY PASSPORT OFFICE

December 8, 1959
60 2080

Case of: Joseph Henry Cort

Appeal

The Department, on October 16, 1959, held that Joseph Henry Cort had expatriated himself on September 11, 1953 under the provisions of Section 349(a)(10) of the Immigration and Nationality Act by remaining outside of the jurisdiction of the United States during a period of national emergency for the purpose of evading or avoiding training in the armed forces of the United States. The Board, at the request of Dr. Cort's attorney, considered the matter without awaiting the formal approval of a certificate of the loss of nationality. A hearing was held on October 28, 1959.

Facts of Case

Joseph Henry Cort was born at Boston, Massachusetts on December 27, 1927 and resided continuously in the United States until the summer of 1948, when he went abroad as a student. He returned to the United States in June 1949 and stayed here until June 1951, when he went to England. He resided in England from June 2, 1951 to July 30, 1954 and has been in Switzerland since August 8, 1954. The following facts have been stipulated by Dr. Cort's attorney:

1. Dr. Cort was registered under the Selective Service Act with Local No. 41 at Brookline, Massachusetts on December 27, 1945.

2. He was given a physical examination on February 4, 1946 and found disqualified for general military service.

3. He was classified 4-F on March 5, 1946.

4. He was registered on July 5, 1949 under the Universal Training and Service Act of 1948 with Local Board No. 25 at Brookline, Massachusetts.

5. He was classified 3-A on September 20, 1949.

6. He was registered on May 25, 1951 under the provisions of the Doctors' Draft Law.

7. On September 11, 1952, he was classified 1-A (medical).

8. He was classified 1-A on February 9, 1953.

[fol. 120] 9. On February 9, 1953, a letter was sent to Dr. Cort by his local board directing him to report to Frankfurt, Germany within 30 days of the receipt of the notice for a physical examination as a Special Registrant.

10. On June 4, 1953, the local board sent a letter to Dr. Cort directing him to report for a physical examination to the board in Brookline, Massachusetts on July 1, 1953.

11. On July 3, 1953, the local board sent a letter to Dr. Cort ordering him to report to Frankfurt, Germany for a physical examination as a regular registrant within 30 days of the receipt of the notice and directing him to notify the local board as to his intended course of actions; otherwise, he would be immediately processed for induction.

12. On August 13, 1953, the local board sent a letter to Dr. Cort ordering him to report to the board on September 14, 1953 for induction.

13. Dr. Cort received the above-mentioned orders sent to him in 1953 but failed to report as directed.

In addition, the Selective Service files indicate that, on December 29, 1952, Dr. Cort, who was then in England, addressed a letter to the Massachusetts Medical Advisory Committee, in which he requested further deferment from Selective Service on the ground that his future civilian function would be more essential to the country than military service. He stated that, in July 1953, he would begin as an instructor in physiology at the Harvard Medical School. The Medical Advisory Committee sent the letter to Dr. Cort's local board on February 3, 1953 with the recommendation that Dr. Cort, as a special registrant, be considered available for active military service.

The local board informed Dr. Cort, in a letter dated February 9, 1953, that the Medical Advisory Committee recommended that he be considered "available for active military service" and that this recommendation was based on his appointment to the Department of Physiology, Harvard Medical School, effective July 1953. The local board sent, with the letter, Form 223, ordering Dr. Cort to report for a physical examination either to it or to the commanding officer of the Examining Facility at Frankfurt, Germany. To this letter and notice and to subsequent ones, Dr. Cort made no response.

At the hearing, Dr. Cort's attorney argued that Dr. Cort had not remained abroad to avoid serving in the United States military forces but had remained outside of the United States to avoid being called before a Congressional committee investigating Communist activities. The attorney also argued that, because of Dr. Cort's physical condition, he would not have been accepted for general military service if he had reported and would not have been commissioned because of his "political" [fol. 121] affiliations. The attorney conceded that Dr. Cort's physical condition would not have disqualified him from serving as a doctor. The attorney also argued that Dr. Cort decided to remain in England because he was happy to be a member of the academic community in England. The attorney also brought out that Dr. Cort had consulted an English attorney who advised him that the order of the draft board could not be legally served, or at least enforced, in England.

Discussion

There is no dispute as to the facts in the case other than the reason for Dr. Cort's failure to comply with the orders from his local board. After a careful review of the Department's files and the files of the draft board, it appears that, as late as December 29, 1952, Dr. Cort definitely intended to return to the United States before July 1953 in order to take a position in the Harvard Medical School. Approximately six weeks later, Dr. Cort was sent a notice to report for a physical examination.

There is no evidence in the file to indicate that Dr. Cort changed his mind about returning to the United States between December 29, 1952 and the date upon which he received the letter of February 9, 1953 from the draft board. The Departments' effort to take up Dr. Cort's passport in 1951 apparently had no effect on his plans for returning to the United States, inasmuch as it appears from his letter of December 29, 1952, a year later, that he was planning to come to this country.

As Dr. Cort indicated in his affidavit of November 2, 1959, complying with the order of his draft board would have meant the abandoning of an excellent teaching position and would, to that extent, have interfered with the development of his career. However, the Board does not feel that a desire to remain abroad for the purpose of self-advancement takes a person outside of the purview of Section 349(a)(10) of U. Immigration and Nationality Act.

The fact that Dr. Cort is under indictment for violating the Selective Service Act does not preclude a holding that he expatriated himself.

By failing to comply with the notices sent to him by his local board, Dr. Cort brought upon himself the presumption mentioned in Section 349(a)(10), that his continued absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. Even if the Board should consider that the presumption could be overcome by showing that a person remained abroad for a purpose other than to avoid the military service, the evidence in Dr. Cort's case, taken as a whole, does not show that he remained abroad for a purpose other than to avoid being drafted.

The evidence shows, by Dr. Cort's own admission, that he intended to return to the United States on or before [fol. 122] July 1953 but that, following the notices sent to him by his draft board, he changed his plans and remained abroad.

Findings

The Board finds (1) that, as of December 29, 1952, Dr. Cort intended to return to the United States on or

before July 1953; (2) that Dr. Cort's draft board, on February 9, 1953, June 4, 1953, and July 3, 1953, sent him notices to report for physical examination; (3) that, on August 13, 1953, the local board sent Dr. Cort an order to report for induction on September 14, 1953; (4) that Dr. Cort did not comply with any of the notices or make any reply to the local board; (5) that Dr. Cort did not return to the United States as he had planned but remained in Europe; (6) that, during the above-mentioned period, the United States was in a state of national emergency; (7) that Dr. Cort has not overcome the presumption raised in the last sentence of Section 349(a)(10) of the Immigration and Nationality Act; and (8) that Dr. Cort remained outside of the jurisdiction of the United States for the purpose of avoiding training and service in the military, air, or naval forces of the United States, thus expatriating himself under the provisions of the aforementioned section of law.

Decision

The previous administrative decision that Dr. Cort expatriated himself is affirmed.

s/ Robert D. Johnson
Acting Chairman

s/ Ashley J. Nicholas

s/ James G. Ottis

130 Cort, Joseph Henry

fols. 123 124 Secretary's Certificate to foregoing papers omitted in printing

[fol. 125] DEFENDANT'S EXHIBIT F-1

BEFORE THE BOARD OF REVIEW ON THE LOSS OF NATIONALITY IN THE PASSPORT OFFICE, DEPARTMENT OF STATE

60 2982

In re Appeal of)
) Docket No. 581
Joseph Henry Cort)

Stipulation

The following facts are stipulated by the appellant:

1. Dr. Cort was registered under the Selective Service Act with Local Board No. 43 at Brookline, Massachusetts on December 27, 1945.

2. He was given a physical examination on February 4, 1946 and found disqualified for general military service.

3. He was classified 4-F on March 5, 1946.

4. He was registered on July 5, 1949 under the Universal Training and Service Act of 1948 with Local Board No. 25 at Brookline, Massachusetts.

5. He was classified 3-A on September 20, 1949.

6. He was registered on May 25, 1951 under the provisions of the Doctors' Draft Law.

7. On September 11, 1952, he was classified 1-A (medical).

8. He was classified 1-A on February 9, 1953.

9. On February 9, 1953, a letter was sent to Dr. Cort by his Local Board directing him to report to Frankfurt, Germany within 30 days of the receipt of the notice for a physical examination as a Special Registrant.

10. On June 4, 1953, the Local Board sent a letter to Dr. Cort directing him to report for a physical examination to the Board in Brookline, Massachusetts on July 1, 1953.

11. On July 3, 1953, the Local Board sent a letter to Dr. Cort ordering him to report to Frankfurt, Germany for [fol. 126] a physical examination as a Regular Registrant within 30 days of the receipt of the notice and directing him to notify the Local Board as to his intended course of action; otherwise, he would be immediately processed for induction.

12. On August 13, 1953, the Local Board sent a letter to Dr. Cort ordering him to report to the Board on September 14, 1953 for induction.

13. Dr. Cort received the above-mentioned orders sent to him in 1953 but failed to report as directed.

/s/ Leonard B. Boudin
Attorney for Appellant

[fol. 127] DEFENDANT'S EXHIBIT F-2



[fol. 140] DEFENDANT'S EXHIBIT 7

Defendant's Exhibit 7.

DEPARTMENT OF EXPERIMENTAL MEDICINE

Tennis Court Road
CAMBRIDGE

Medical Research Council
and
University of Cambridge

Telephone
Cambridge [illegible]

Dear Sirs,

It is [illegible] that my application for [illegible] Harvard Medical [illegible] that my draft board is [illegible] [illegible] from a change of address [illegible] [illegible] I registered for the special draft [illegible] [illegible] [illegible] time I was then attending [illegible] [illegible] of my change of address, and [illegible] [illegible] and that by registering [illegible] [illegible] irregular [illegible], I was to state that it [illegible] [illegible] all of my plans were [illegible] medical advisory committee, [illegible] by Prof. [illegible].

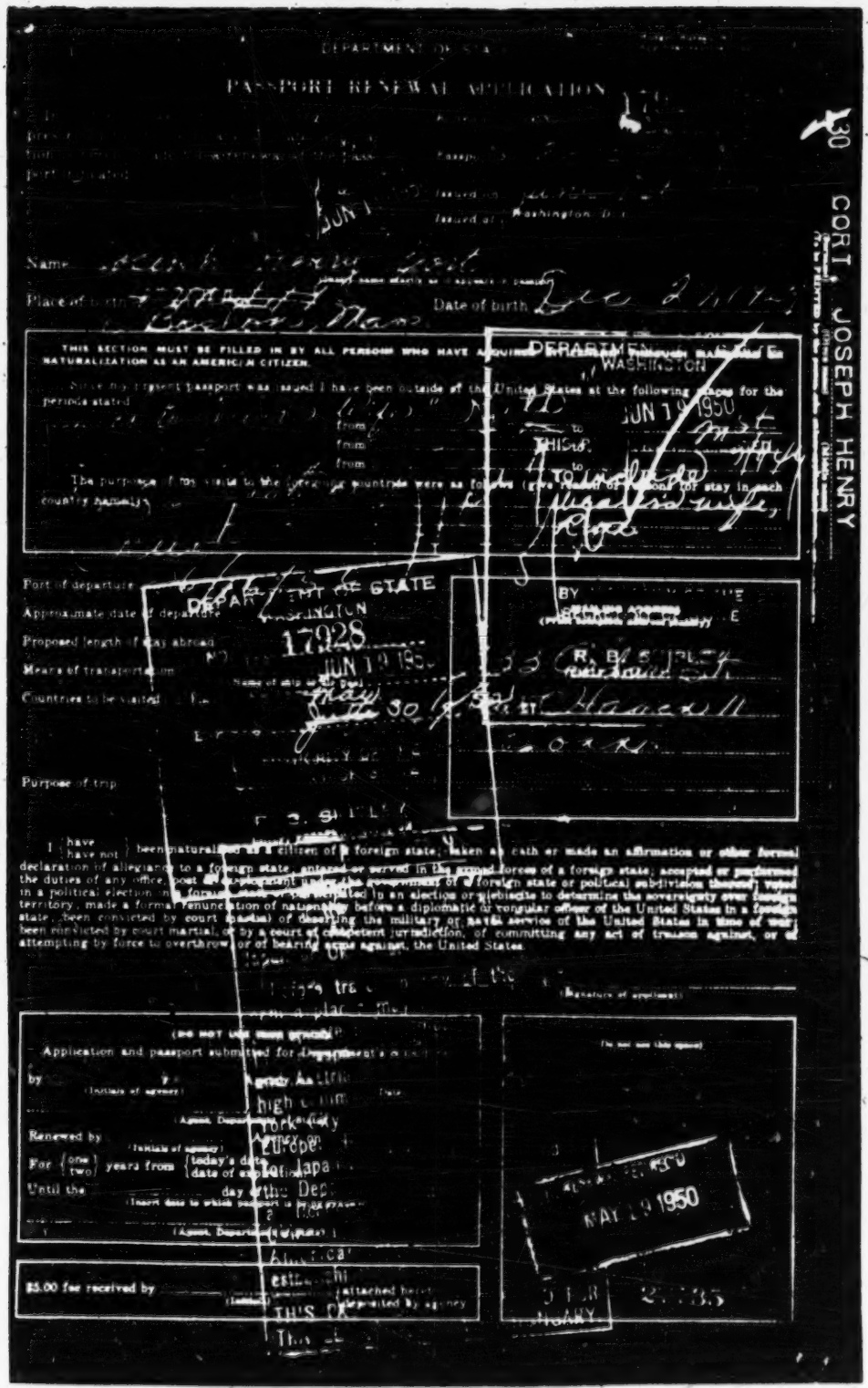
I assure [illegible] that I have [illegible]

Local Board No [illegible]
Norfolk County

FEB 27 '53

34 Mar[illegible]
Br[illegible]

{fol. 129} DEFENDANT'S EXHIBIT F 7



[fols. 130-132] • • • •

Defendant's exhibit F-13—Letters from Walter M. Walsh, American Vice Consul, London, England to Joseph H. Cort, dated November 28, 1951, December 10, 1951 and December 27, 1951 omitted. Printed side page 72 ante.

[fols. 133-134] Secretary's Certificate to foregoing paper omitted in printing.

[fol. 135] DEFENDANT'S EXHIBIT G-2

Special Registration No. 1

September 8, 1952

Subject: JOSEPH HENRY CORT, M.D., PR.#3,
R-19-25-27-408

To: Mass. Medical Advisory Committee
8 The Fenway, Boston, Mass.

From: Local Board #25
34 Marion St., Brookline, Mass.

1. The above named registrant received his M.D. degree from Yale University School of Medicine in June 1951.

2. From an article in the Boston Herald May 27, 1952 we learn that he was awarded a one-year extension of his post-doctoral fellowship in the field of pediatries under an educational program sponsored by the National Foundation for Infantile Paralysis. Dr. Cort is conducting his studies at the University of Cambridge, England, under the supervision of Prof. R. A. McCance. Fellowships are awarded on recommendation of a national committee of scientists and clinicians.

3. May we have your recommendations.

Dorothy L. Manson, Clerk

11/17/52

M.A.B. wrote to Dr. Cort
Nat. Foundation N. Y.

[fol. 136] DEFENDANT'S EXHIBIT G-3

DEPARTMENT OF EXPERIMENTAL MEDICINE

Tennis Court Road
CAMBRIDGE

29.XII.1952
12 29 52

COPY

Special Registration No. 1

Dear Sirs,

I have applied for deferment from Selective Service from the sincere belief that my present, and particularly my future, civilian function is and shall be far more essential to my country than military service.

I received my M.D. in June, 1951 and since that time have had no clinical experience whatsoever, nor do I intend to acquire any. Under the auspices of the National Foundation for Infantile Paralysis, Inc., I have for the past two years been a trainee in research in Pediatric Physiology in the Dept. of Experimental Medicine in the University of Cambridge. Although the title of my Fellowship is a Pediatric one, this has involved only laboratory investigation. In July, 1953, I shall begin as Instructor in Physiology under Professor E. M. Landis, Department of Physiology, Harvard Medical School. There, my duties will be 80-90% teaching, and I will be primarily responsible for the Physiology section of the course of instruction for the first year graduate students in medical sciences in Harvard University, in a new General Education program in the medical sciences. Research will be very secondary at first in this new appointment.

I believe, therefore, that while my possible military usefulness will be only a very indirect one, my civilian function is an essential one.

Yours sincerely,

/s/ J. H. Cort
Joseph H. Cort, M.D., Ph.D.

Massachusetts Medical Advisory Committee
Selective Service System
8, The Fenway
Boston 15, Mass.

Local Board No. 25, Norfolk County
Jan 14 1953

34 Marion St., Brookline, Mass.

[fol. 137] DEFENDANT'S EXHIBIT G-4

Augustus Thorndike, M.D., Chairman
V. A. Getting, M.D.
Anne M. Bonner, D.M.D.
Margaret L. Boyle, R.N.

MASSACHUSETTS ADVISORY COMMITTEE
To the Selective Service System
8 The Fenway
Boston 15, Mass.

R 19-25 27 408

Special Registration No. 1

Date: 3 February 1953

SUBJECT: Corr. Joseph Henry M.D. Priority #11 Dept. of Experimental Med., Cambridge, England (Tennis Court Road). Under auspices of Nat'l Foundation for Infantile Paralysis, Inc.

July 1953 will begin as Instr. in Physiology Harvard Medical School.

To: Local Board No. 25
34 Marion Street
Brookline, Mass.

1. The Massachusetts Advisory Committee recommends that the subject special registrant be considered available for active military service.

s: Augustus Thorndike
Augustus Thorndike, M.D.
Chairman

cc: Major Bowman (Mass. SSS Hdq-)
Major Feeney do

Local Board No. 25, Norfolk County
Feb 4 1953
34 Marion St., Brookline, Mass.

[fol. 138] DEFENDANT'S EXHIBIT G-5

Special Registration No. 1

February 9, 1953

PR.3-M
R 19-25-27-408

Mr. Joseph Henry Cort
Department of Experimental Medicine
Tennis Court Road
Cambridge, England

Dear Doctor:

The Medical Advisory Commitee on February 3 recommended to the Board that you be considered "available for active military service". This recommendation was based on your appointment to the Department of Physiology, Harvard Medical School effective July 1953. Your classification, therefore, remains 1-A.

Attached is Form 223 ordering you to report for physical examination. If you prefer to be examined at Frankfurt you should write immediately to the Commanding Officer of the Facility advising him of the date on which you will present yourself for the examination. This date must be within thirty (30) days of the date you receive this letter. You should arrive at the Facility on that date. You must take with you to the Examining Facility this letter and all of the forms and papers you receive with it. You must pay all your expenses going to, while at, and returning from the Facility. When this local board is advised by the Examining Facility of the results of your examination, a Notice of Acceptability (DD Form No. 62) will be mailed to you showing whether or not you are acceptable to the armed forces.

Very truly yours,

Dorothy L. Manson, Clerk

Enc.
DD 47 (4 copies)
SSS Form 223
DD 390 in triplicate

P.S. We are also attaching three forms DD 390 which should *all* be completed by you and taken with you at time of examination.

[fol. 139] DEFENDANT'S EXHIBIT 6

Defendant's Exhibit 6

Local Board No. 45
Norfolk County
FEB 9 1953
34 Marion St.
Brookline, Mass.
(Local Board Stamp)

SELECTIVE SERVICE SYSTEM

Order to Report for
Armed Forces Physical Examination

February 9, 1953
(Date of mailing)

Pr.3-M

To JOSEPH HENRI COURT 19 25 27 408
(First name) (Middle name)

Department of Experimental Medicine, Tennis Court Road
(Street and number)

Cambridge England
(City) (County, if any)

You are hereby directed to report for Armed Forces Physical Examination to the Local Board (Station) at 34 Marion St., Brookline, Mass. In lieu of reporting to this local board, you may be examined outside the United States at the following Examining Facility of the Army.

FRANKFURT MILITARY POST SCREENING CENTER, HDQRS.BLDG., ANNEX B, RM.214-A, FRANKFURT ON THE MAIN, GERMANY

within thirty (30) days of the date your received this notice at 6:45 A. m. on the 27th of February 1953
(Hour)

Member or clerk of Local Board

IMPORTANT NOTICE

When you report for Armed Forces Physical Examination you will be forwarded to a Joint Examining and Induction Station where you will be given a complete physical examination to determine whether you are physically qualified for service. Upon completion of your physical examination, you will be returned to this Local Board. You will be furnished transportation and meals and lodgings when necessary. Following your Armed Forces Physical Examination your Local Board will mail you a certificate issued by the commanding officer of the station showing whether or not you are acceptable for service in the Armed Forces.

This Armed Forces Physical Examination is given for the purpose of determining your acceptability for military service. It is well, in arranging your affairs, to keep in mind the possibility of being rejected at the induction station. If you are employed, you should advise your employer of this notice, and of the possibility that you may not be accepted for military service. Your employer can then be prepared to replace you if you are finally accepted, or to continue your employment if you are rejected.

If you fail to report for Armed Forces Physical Examination as directed, you will be delinquent and will be immediately ordered to report for induction into the Armed Forces. You will also be subject to fine and imprisonment under the provisions of the Universal Military Training and Service Act, as amended.

If you are so far from your own Local Board that reporting in compliance with this order will be a hardship and you desire to report to the Local Board in the area in which you are now located, take this Order and go immediately to that Local Board and make written request for transfer for Armed Forces Physical Examination.

SSS Form No. 223 (Revised 9 25 41) (Supplies of original printing shall be used until exhausted)

[fol. 141] DEFENDANT'S EXHIBIT G 8

Defendants Exhibit G-8

SELECTIVE SERVICE SYSTEM

Order to Report for
Armed Forces Physical Examination

Local Board No. 19 Middlesex Mass.

June 4, 1953
Date of Mailing

To Joseph [illegible] Cash RD 9 25 27 408
First name Middle name Last name

Department of Experimental Medicine, Tennis Court Road
Number and street

Cambridge England
City State

You are hereby directed to report for Armed Forces Physical Examination to the Local Board stated above at

Cabot School, N. Marion St., Somerville, Massachusetts
Place of reporting

at 8:30 A. m. on the 1st of July 1953
Hour of reporting Day Month Year

[illegible]
Member or clerk of Local Board

IMPORTANT NOTICE

TO ALL REGISTRANTS:

When you report for Armed Forces Physical Examination you will be forwarded to an Armed Forces Examining Station where you will be given a complete physical examination to determine whether you are physically qualified for service. Upon completion of your physical examination, you will be returned to this Local Board. You will be furnished transportation and meals and lodging when necessary. Following your Armed Forces Physical Examination your Local Board will mail you a certificate issued by the commanding officer of the station showing whether or not you are acceptable for service.

If you are employed, you should advise your employer of this order and inform him that the examination is merely to determine your acceptability for service. It is not an order to report for induction or an order to perform civilian work.

If you are so far from your own Local Board that reporting in compliance with this order will be a hardship and you desire to report to the Local Board in the area in which you are now located, take this Order and go immediately to that Local Board and make written request for transfer for Armed Forces Physical Examination.

TO CLASS I-A AND I-A-O REGISTRANTS:

If you fail to report for Armed Forces Physical Examination as directed, you will be delinquent and will be immediately ordered to report for induction into the Armed Forces. You will also be subject to fine and imprisonment under the provisions of the Universal Military Training and Service Act, as amended.

TO CLASS I-O REGISTRANTS:

The Armed Forces Physical Examination is given for the purpose of determining your acceptability for service. If you are found acceptable, you will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety or interest. If you fail to report for or to submit to the Armed Forces Physical Examination, you will be deemed to be available to be ordered to perform civilian work in the same manner as if you had taken the Armed Forces Physical Examination and had been found acceptable.

SSS Form No. 220 (Revised 3-10-48) (Supplies of original printing shall be used until exhausted except for I-O Registrants) [illegible]

[fol. 142] DEFENDANT'S EXHIBIT G-9

[SEAL]

MASSACHUSETTS STATE HEADQUARTERS
FOR
SELECTIVE SERVICE
349 Lincoln Street
Hingham, Massachusetts

In Replying Address
State Director of Selective Service
and Refer to
6.5 PFF.

5 June 1953

Special Registration No. 1

Local Board No. 25, Norfolk County
Jun 8 1953
34 Marion St., Brookline, Mass.

SUBJECT: JOSEPH HENRY CORT, M. D.
SELECTIVE SERVICE No. 19 25 27-408

To: Chairman, Local Board No. 25
34 Marion Street
Brookline, Massachusetts

1. Inclosed is the Cover Sheet containing the records of subject registrant.

2. This Office has attempted to ascertain the present whereabouts of Dr. Cort through the Dean's Office, Harvard Medical School. Information was received that the appointment as an instructor at that school had been cancelled in view of the registrant's selective service status.

3. Because this man has liability as a special registrant and also a regular registrant, is classified as available for military service both as a regular and special registrant, and as there is no definite proof in the file to show that he did not comply with your Order to Report for Armed Forces Physical Examination of 9 February 1953, as a

special registrant, it is suggested that, rather than declare Dr. Cort delinquent as a special registrant, he be processed immediately for induction as a regular registrant.

4. Since the information contained in his file indicates that the registrant will be in the United States in July, it is requested that he be ordered to report for preinduction examination as a *regular* registrant on 1 July 1953. The order should contain no information relative to taking his armed forces examination outside the United States.

5. Please advise this Headquarters of the developments in this case.

For the State Director:

/s/ Paul F. Feeney
PAUL F. FEENEY
Major, QMC
Chief, Manpower Section

Inclosure

[fol. 143] DEFENDANT'S EXHIBIT G-10

Special Registration No. 1

July 3, 1953

Dr. Joseph Henry Corl,
94 Hartington Grove
Cambridge, England

RI9 25 27-408

Dear Sir:

No communication has been received from you in reference to your notice dated June 4, 1953 ordering you to report to this office for Pre-Induction Examination on July 1, 1953, and you failed to report.

Attached is notice ordering you to report for examination at Frankfurt, Germany. You are to write to the Commanding Officer of the Facility immediately, advising him of the date on which you will present yourself for this examination. This date must be within thirty (30) days of the date you receive this letter. You should arrive at the Facility on that date. You must take with you to the Examining Facility this letter and all papers you receive with it. You must pay all your expenses going to, while at, and returning from the Facility. When this local board is advised by the Examining Facility of the results of your examination, a Notice of Acceptability (DD Form No. 62) will be mailed to you showing whether or not you are acceptable to the armed forces.

Upon receipt of this letter advise us immediately what action you are taking, whether you will return to the United States for Examination or go to Frankfurt, Germany. If we do not hear as to your course of action within thirty days, you will be immediately processed for Induction.

At the same time, advise what action you took upon receipt of notice to report for Examination on February 27, 1953 here, or in Frankfurt as a Special Registrant. No papers have been returned to us.

Very truly yours,

47's Enc.
223 "

Dorothy L. Manson, Clerk

(per Maj Feeney 7/27/53)

[fol. 144]

(Local Board Stamp)

Approval of Budget Bureau not required.

SELECTIVE SERVICE SYSTEM

Order to Report for Armed Forces Physical Examination

July 3, 1953
(Date of mailing)

To JOSEPH (Middle name) HEPP (Last name) C.MT (Registrant's Selective Service Number) 819 25 27 406

96 Hartington Grove
(Street and number)

Cambridge (City) England (State)

You are hereby directed to report for Armed Forces Physical Examination to the Local Board named above at: Examining Facility of the Army, Frankfurt Military Post Screening Center,

Headquarters Bldg., Annex B, Rm.21h-4, Frankfurt on the Main, Germany
(Place of reporting)

within thirty (30) days of the date you receive this notice

at (Hour of reporting) m., on the (Day) of (Month), 19

(Member or clerk of Local Board)

IMPORTANT NOTICE

TO ALL REGISTRANTS:

When you report for Armed Forces Physical Examination you will be forwarded to an Armed Forces Examining Station where you will be given a complete physical examination to determine whether you are physically qualified for service. Upon completion of your physical examination, you will be returned to this Local Board. You will be furnished transportation and meals and lodging when necessary. Following your Armed Forces Physical Examination your Local Board will mail you a certificate issued by the commanding officer of the station showing whether or not you are acceptable for service.

If you are employed, you should advise your employer of this order and inform him that the examination is merely to determine your acceptability for service. It is not an order to report for induction or an order to perform civilian work.

If you are so far from your own Local Board that reporting in compliance with this order will be a hardship and you desire to report to the Local Board in the area in which you are now located, take this order and go immediately to that Local Board and make written request for transfer for Armed Forces Physical Examination.

TO CLASS I-A AND I-A-O REGISTRANTS:

If you fail to report for Armed Forces Physical Examination as directed, you will be delinquent and will be immediately ordered to report for induction into the Armed Forces. You will also be subject to fine and imprisonment under the provisions of the Universal Military Training and Service Act, as amended.

TO CLASS I-O REGISTRANTS:

The Armed Forces Physical Examination is given for the purpose of determining your acceptability for service. If you are found acceptable, you will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety or interest. If you fail to report for or to submit to the Armed Forces Physical Examination, you will be deemed to be available to be ordered to perform civilian work in the same manner as if you had taken the Armed Forces Physical Examination and had been found acceptable.

SSS Form No. 223 (Revised 1-15-53) (Reproduction of original printing shall be used until exhaustion except for minor changes)

[fol. 145] DEFENDANT'S EXHIBIT G-11

√ Defendant's Exhibit D-11

August 3, 1953

SUBJECT: JOSEPH HENRY COHEN [illegible]

TO: MASS. STATE HDQRS. SELECTIVE SERVICE
349 Lincoln St., Hingham, Mass.

FROM: LOCAL BOARD #25
34 Marion St., Brookline, Mass.

1. With reference to telephone conversation this morning, we are enclosing file of the above named registrant.

2. No communication has been received from him since he was sent an order to report for physical examination on July 3, 1953.

Dorothy L. Manson

Enc. Dorothy L. Manson, Clerk

For the State Director:

PAUL F. FARNEY
Major, CMC
Chief, Manpower Section

[fol. 146] DEFENDANT'S EXHIBIT G-12

Defendant's Exhibit G-12

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

August 13, 1953

Copy mailed to Mr. Cort at
94 Washington Grove
Cambridge, Mass.

JOSEPH HENRY CORT R19 25 27 408

576 Washington Street.

Brookline Mass.

GREETING:

Having submitted yourself to a Local Board composed of your neighbors for the purpose of determining your availability for service in the Armed Forces of the United States, you are hereby ordered to report to the Local Board named above at Cabot School, 34 Marion St., Brookline, Mass.

at 6:45 A.M. on the 11th of September, 1953, for forwarding to an induction station.

* Date corrected from 8th to 14th by Lt. Cunningham Local Bd. Mem. 8/12/53.

IMPORTANT NOTICE

This Local Board will furnish transportation to the induction station where you will be examined, and, if accepted for service, you will then be inducted into a branch of the Armed Forces. If you are not accepted, return transportation will be provided.

Persons reporting to the induction station in some instances are found to have developed disqualifying defects since being examined and may be rejected for those or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

WILFUL failure to report promptly to this Local Board at the place specified above and at the hour and on the day named in this notice is a violation of the Universal Military Training and Service Act, as amended, and subjects the violator to fine and imprisonment. You must keep this form and bring it with you when you report to the Local Board. Bring with you sufficient clothing for 5 days.

If you are on the occupational deferred list of your own Local Board that reporting in compliance with this Order will be a serious hardship and you desire to request a Local Board in the area of which you are now located, go immediately to that Local Board and make written request for transfer of your delivery for induction, taking this Order with you.

93

[fol. 147] DEFENDANT'S EXHIBIT G-13

Defendant's Exhibit G-13

9/11/53 R-19 25-27-408

Unknown person telephoned as of this date to advise that Joseph H. Cort would not report for production on Sept 14, 53. Said he was not in this country

L. H. Mackenzie

[fol. 148] DEFENDANT'S EXHIBIT G-14

Defendant's Exhibit G-4

SELECTIVE SERVICE SYSTEM
DELINQUENT REGISTRANT REPORT

(Local Board Stamp)

September 30, 1953
Date

George F. Garrity
P.O.Building, Boston, Mass.

IDENTIFICATION OF DELINQUENT

JOSEPH HENRY COHE — None
(Full name of registrant)

94 Hartington Grove, Cambridge, ENGLAND — LO.6-1829 (Brookline, Mass.)
(Registrant's present address) (Telephone number)

R19 25 27 408
(Order number)

034-18-3285
(Social Security number)

I-A
(Present classification)

None
(Other classifications)

I
(Race)

August 13, 1953
576 Washington St., Brookline, Massachusetts
with copy to 94 Hartington Grove, Cambridge, ENGLAND
(Address of registrant at time of delinquency)

Left country without Permit — Bd.advised he was in England on Oct.11,1951

Failed to report for Pre-Induction Exam. — July 1, 1953, Brookline, Mass. and within 30 days of receipt of notice of 7/3/53 at Frankfurt, Germany

Failed to report for Induction — September 11, 1953

Has Dorothy L. Hanson,
(Name of person making report)

L.B..25, 34 Marion St., Brookline, Mass. — RE.2-7014 — Clerk
(Local board) (Address) (Telephone number) (Title)

on September 11, 1953 — 94 Hartington Grove, Cambridge, England
(Date) (Address)

[fol. 149]

The person who will always know the delinquent's address is Boris Cort (father)

576 Washington St., Brookline, Mass.

Phone on June 27, 1953 by Dorothy L. Manson

L.B.#25, 34 Marion St., Brookline, Mass. BE.2-7014 who is a Clerk

local board with the following result - was advised son still in England, no knowledge of when he might return to the States. Has address of 94 Hartington Grove, Cambridge, Eng. given.

Tennis Court Road, Cambridge, Engl. has not

Is not

X X X

L.B. #25 Joseph Henry Cort July 3, 1953

[fol. 150] Secretary's Certificate to foregoing paper omitted in printing.

[fol. 151] DEFENDANT'S EXHIBIT H-1

DEPARTMENT OF EXPERIMENTAL MEDICINE
Tennis Court Road
Cambridge

29.XII.1952

Medical Research Council
and
University of Cambridge

60 2985

Telephone:
Cambridge 2389

Dear Prof. Landis,

I should like to accept the position of instructor in your department, as outlined in your recent letter. Concentrated teaching experience will be very welcome to me, and I only hope that I can meet to your satisfaction the formidable outline that you presented.

The only transportation that I have been able to arrange in a busy coronation spring will bring my wife and I to New York on the 29th or 30th of June, so that while it will just be possible for me to start on July 1st, it will be rather inconvenient to start work and try to find a dwelling place simultaneously. I should prefer to start on August 1st, which would also give me a chance to get my bearings in the department, but I shall begin in July should you desire it.

Of the department itself, I have few questions at the moment without any actual physical contact with it. I remember much of the physical layout from wandering through while still an undergraduate, and not the least of English training is to learn to adapt the same research to the available time and facilities. I am naturally more concerned with the teaching facilities at the present, and

the program already developed by Dr. Pappenheimer. Is there such a thing as a printed lecture or laboratory syllabus of the course in progress? Such things were very much in vogue in the undergraduate school and would be very helpful to me. I shall address more specific questions to Dr. Pappenheimer.

Sincerely yours,

/s/ Jos. H. Cort
Joseph H. Cort

Prof. E. M. Landis, M.D.,Ph.D.
Dept. of Physiology
Harvard Medical School
Boston 15, Mass., U.S.A.

[fol. 152] DEFENDANT' EXHIBIT H-2

January 7, 1953

Dr. Joseph H. Cort
Department of Experimental Medicine
University of Cambridge
Tennis Court Road
Cambridge, England

Dear Doctor Cort:

Thank you for your letter of December 29 accepting the Instructorship here. We will regard the matter as settled, with the one reservation that our tentative arrangements are still to be approved by the Dean's office. I shall be very much surprised indeed if any difficulties arise there.

In order that I may put in an official "Recommendation for Annual Appointment and Salary" would you please look over the attached sheet to make sure that it is correct insofar as I have filled it out. Some six items have been checked along the left-hand margin which will need to be added and which I could not find in the information you sent on to me previously. For instance, did you receive an A.B. from Harvard College in 1946? Do you have any official title in your present position? None of these items is tremendously important but the Dean's office likes to have as complete a record as possible. If I have made any errors please correct them.

As to date of arrival, August 1 or thereabouts will be in every way satisfactory to us and will have the advantage of giving you some free time after you return from England. Don't feel obliged to meet any fixed deadlines hence "August 1 or thereabouts."

I have asked Dr. Pappenheimer to gather together for you as complete a lecture and laboratory syllabus of the course as is possible at this date. You will be receiving this direct from him. He will be glad, I am sure, to answer any questions that may arise as you go through this material.

Looking forward to having you with us.

Very sincerely yours,

EML mnd
cc: Dr. Pappenheimer

Eugene M. Landis, M. D.

[fol. 153] DEFENDANT'S EXHIBIT H-3.

Department of Physiology
HARVARD MEDICAL SCHOOL
25 Shattuck Street, Boston 15, Mass.

Dr. Reginald Fitz
Harvard Medical School
25 Shattuck Street
Boston 15, Massachusetts

January 26, 1953

Dear Doctor Fitz:

This is a reply to your telephone call relative to my verbal statement that Dr. Joseph Cort will be "essential" to the Physiology Department as of August 1, 1953. Obviously, my duty is to look at this matter as a Head of Department in a pre-clinical *teaching* field in which the recruitment of good *teachers*, well-trained in fundamentals, is a continuously more difficult problem. I realize, also that many factors other than educational ones must enter into the final decision and will not be surprised to meet a denial of my recommendation in this case and others like it. Despite the difficulties that a denial will produce we will, of course, have to continue to teach our annual groups of graduate students and medical students with as little curtailment of course content and quality as we can possibly manage.

Our reasons for (a) making a new appointment at this time and (b) regarding Dr. Joseph H. Cort specifically to be "essential" are as follows:—

1. As of July 1, 1952, this department lost by transfer at higher salary to the School of Public Health an experienced instructor, Dr. Radford, without being able to make any replacement of equal experience.

(Note:—Medical students and dental students number 131, graduate students in the department, 2; graduate students in Physiology A 5 to 10, graduate students in Medical Sciences 210 ab, 15; Research Fellows usually 5 to 7. Total 158 to 165 students. For these 160 we have 5 experienced instructors. The 12 staff members you mentioned as listed in the catalog include:—

(a) a small nucleus of 5 experienced instructors
(b) courtesy appointments and affiliates, 3 to 4
(c) Research Fellows (who are also students) 4 to 5

(The small nucleus of five experienced men mentioned above are *responsible* for *all planning of lectures and laboratory work*; the affiliates help for a few hours at intervals in their special fields. The Research Fellows are essentially students.)

2. As of July 1, 1953, Dr. Ralph Kellogg, also an instructor of great competence and of several years experience will be leaving for a better job in California.

3. As of July 1, 1952, the Department of Physiology accepted responsibility for part of a new course designated Medical Sciences 201 ab which calls for instructors of exceptional experience. For this course we needed the [fol. 154] very best that we were able to supply in the department or obtain elsewhere. For this academic year Dr. John R. Pappenheimer, an Assistant Professor, was assigned to teach this course on practically a 100 percent teaching time basis, without appreciable time remaining for research activity. This, may I add, interrupted completely one of the most promising fundamental research programs I know of.

4. Dr. Papenheimer is quite justifiably unwilling to continue this 100 percent teaching assignment for another year, having done his share of this exacting work. Hence he and I went over very carefully the qualifications of some seven possible applicants finding none of them, except Dr. Cort, satisfactory either (a) because they were unwilling to do teaching to the extent of 80 to 100 percent of their time or (b) because they did not have the requisite advanced experience in physics, mathematics, physiology and some medicine which this special course requires. Hence, for this particular course, we felt that Dr. Cort was our only possibility, if the alleged aims of the course were to be fulfilled.

Under this arrangement, Dr. Pappenheimer would have taken over the equivalent of the work dropped by Dr. Kellogg on July 1, 1953, as mentioned under paragraph 2

above. As you will notice, there is still no adequate replacement for Dr. Radford and Dr. Cort's threatened unavailability will therefore reduce our teaching complement of *experienced* people by two, rather than one.

5. It is worth mentioning that Dr. Cort *would not be doing any appreciable research during* his appointment but would be spending (as I described it to him in offering him the position), 80 to 90 percent of his time in actual teaching service. He understands this and accepted it, though several other suitable applicants would not do so. This is far from a "luxury appointment."

For these reasons, I have no hesitation in recommending (from the University standpoint) that Dr. Cort's status be regarded as "essential",—if a staff of 4 or 5 experienced teachers, is to be provided for the 165 students which are assigned to us each year.

I would like to add one other important comment. I would be useless form the standpoint of the department or of the school to have Dr. Cort teaching here for *any period less than two years.*

Dr. Cort is now 26, more than usually experienced in research for that age—and not as experienced as most in clinical medicine. Two years form now he could enter military service at 28 and serve even better than now as a teacher and investigator.

Nevertheless, if it is your opinion that at best he would be with us for only 6, 12, or even 18 months, it will be simplest to deny this recommendation of mine right now. An early decision would be helpful because we will try at once and again to find a replacement and reorganize our various courses to match the experience and qualifications of whatever new man we can find.

If I can supply any further information please let me know.

Yours truly,

Eugene M. Landis, M.D.

EML?mml

[fol. 155] DEFENDANT'S EXHIBIT H-4

January 29, 1953

Dr. Augustus Thorndike, Chairman
Mass. Volunteer Advisory Committee to S.S.S.
8 Fenway
Boston, Mass.

Dear Dr. Thorndike:

This Sub-Committee has investigated the case of Dr. Joseph H. Cort and its accompanying papers.

This Sub-Committee recommends that he be not regarded as occupying a position essential to civilian care needs or medical teaching.

Yours sincerely,

Reginald Fitz, M.D., Secretary,
Sub-Committee on Medical
Education and Training.

[fol. 156] DEFENDANT'S EXHIBIT H-5

January 31, 1953

Dr. Joseph H. Cort
Department of Experimental Medicine
University of Cambridge
Cambridge, England

Dear Doctor Cort:

A complicating factor of first magnitude has entered into the plans we have been making by letter. Early in our correspondence I had thought briefly about your military status but then, frankly, in my firm interest concerning your aims and ours, I had forgotten the matter. The Dean's office, however, has received a request from your draft board asking whether this position which you are planning can be regarded as important enough to make you "essential" rather than available for draft. I wrote a letter to the Dean recommending, in view of the nature of the job, that you be termed "essential." This recommendation of mine was denied. There seems to be nothing more that I can do. One complicating factor was the fact that your draft board had not been notified of your change of address when you went overseas.

As matters stand, if you are physically fit, the chances seem to be that you would be here for not more than a few months before being required to enter the service. Dr. Fitz, Assistant Dean in charge of these matters, told me that if you were wise you would apply for a commission as soon as possible, even while overseas, if that is feasible but that is, of course, something that you would have to explore very carefully. There may be disadvantages in that procedure, too.

I send on these fragmentary comments, wondering what information and opinions you may have on the subject.

Very sincerely yours,

Eugene M. Landis, M. D.

EML/mml

[fol. 157] DEFENDANT'S EXHIBIT H-6

DEPARTMENT OF EXPERIMENTAL MEDICINE
Tennis Court Road
Cambridge

Medical Research Council
and
University of Cambridge

Telephone:
Cambridge 2389

10,Feb.,1953

Dear Prof. Landis,

I am surprised at your recent news since I had assumed, obviously without justification, that teaching positions would be essential, particularly for people with no clinical trainfng. At the present time I have received no information whatsoever from my draft board, and until I hear something definite from them I am reluctant to take a decision that may prove to be foolish or premature. I shall immediately communicate any developments.

Yours sincerely,

/s/ Joseph H. Cort
Joseph H. Cort

Prof. E. M. Landis
Dept. of Physiology
Harvard Medical School
Boston,Mass.,USA

[fol. 158] DEFENDANT'S EXHIBIT H-7

Dr. Joseph H. Cort
University of Cambridge
Department of Experimental Medicine
Tennis Court Road
Cambridge, England

March 6, 1953

Dear Doctor Cort:

Thank you for your note of February 10. In presenting your case to the Dean's office I mentioned all of the points given in your letter. The important fact is that the services are so desperately in need of M.D.'s, even with minimal clinical training, that the Dean's office regards it as practically impossible to expect to defend as "essential" anyone who is about to take a new post and particularly those who have received government subsidy during their medical school days, without having served at least 34 months (I think it is) in the services after graduation.

Dr. Reginald Fitz, Assistant Dean, suggested that so far as he could see the only conditions under which you can clarify your status is to apply at once for a commission, if that is possible abroad. If, for physical reasons, you were turned down then the Dean's office could proceed to consider your appointment. I suppose you have written your draft board for advice and I mention this merely to indicate the opinion of the Dean's office here.

Hence, there seems to be nothing that I can do except file the information enclosed with your letter, until I hear from you further. I regret as much as you do this apparently insuperable snag in plans but if you are physically fit (and they are refusing only those with major disabilities) it looks as though some military service or, possibly, research in some military establishment is the only solution.

With all good wishes,

Yours truly,

Eugene M. Landis, M. D.

EML/mml

[fol. 159] DEFENDANT'S EXHIBIT H-8

DEPARTMENT OF EXPERIMENTAL MEDICINE
Tennis Court Road
Cambridge

Medical Research Council
and
University of Cambridge

Telephone:
Cambridge 28

29.V.1953

Dear Prof. Landis,

I gather from the information available to me by thi
time that your advice and predictions were quite correct
My application, therefore, will have to remain on file
Sincerest regrets and regards.

s/ Joseph H. Cort
Joseph H. Cort, M.D., Ph.D

[fol. 160] Secretary's Certificate to foregoing papers omitted in printing.

[fol. 161] DEFENDANT'S EXHIBIT I-1

[SEAL]

NATIONAL HEADQUARTERS
Office of the Director
SELECTIVE SERVICE SYSTEM
451 Indiana Avenue Northwest
Washington 25, D. C.

60 6393

Address Reply to
The Director of Selective Service

Oct 16 1959

Mr. John T. White, Chief
Foreign Operations Division
Passport Office
Department of State
Washington 25, D. C.

Subject: Joseph Henry Cort
SS No. 19-25-27-408
Your Reference: PT/FEA-130

Dear Mr. White:

This is in reply to your letter of October 8, 1959, in which you set forth the facts pertaining to the above-named registrant and requested our views as to his status should he complete a tour of active duty with the United States Public Health Service or should he apply for an internship in that service.

On September 14, 1953, Dr. Cort failed to comply with an order from his local board to report for induction. As a result of this failure, he was indicted by the Federal grand jury, Boston, Massachusetts, in 1954 and that indictment is still outstanding. In our opinion, Dr. Cort is a flagrant violator of the Selective Service law. While the decision with respect to continuing the indictment in effect and prosecuting him should he return to this country is that of the United States Attorney, this agency would

seriously object to any decision not to proceed with his prosecution.

In response to your first question, under the current provisions of the Selective Service law should Dr. Cori enter into the active commissioned service of the Public Health Service and complete a tour of duty of 24 months or more, he would have fulfilled his service obligation. In answer to your second question, should he file an application for internship in the United States Public Health Service, we do not believe that that action of itself would be considered as compliance with the requirements of the Selective Service law.

For The Director,

/s/ Daniel O. Omer
DANIEL O. OMER
Colonel, JAGC
General Counsel

(Dec. 1952) DEFENDANT'S EXHIBIT I-2

[SEAL]

NATIONAL HEADQUARTERS
Office of the Director
SELECTIVE SERVICE SYSTEM
451 Indiana Avenue Northwest
Washington 25, D. C.

Address Reply to
The Director of Selective Service

Oct 28 1959

Mr. Robert D. Johnson
Acting Chairman, Board of Review
on the Loss of Nationality
Department of State
Washington 25, D. C.

Subject: Joseph Henry Cort
SS No. 19-25-27-408
Year Reference: 130

Dear Mr. Johnson:

This is in reply to your letter of October 27, 1959, requesting information from the above-named registrant's selective service file concerning the various steps which were taken in his case from the time he registered until he became a delinquent.

Dr. Cort has two selective service cover sheets, one as a regular registrant and one as a special registrant (M.D.). For greater clarity we will set forth the actions taken in each of these capacities separately rather than intertwining them both in chronological order.

Regular Registrant

Dr. Cort registered on July 5, 1949. On September 20, 1949, he was classified in Class III-A as a married man living with his wife. He was classified in Class II-A, which is an occupational deferment based upon his status as a doctor of medicine, on November 15, 1951. The local

board on February 19, 1953, classified him in Class I A as available for military service.

On June 4, 1953, Dr. Cort was mailed an order to report for an armed forces physical examination at Brookline, Massachusetts, on July 1, 1953. In view of the fact that the local board had received information that he was residing in Cambridge, England, the local board on July 3, 1953, mailed him another order to report for physical examination with instructions to report to an army examining facility in Frankfurt on the Main, Germany, within 30 days of the receipt of the notice.

[fol. 163] Dr. Cort failed to present himself for a physical examination and failed to communicate with his local board. Consequently, on August 13, 1953, the local board mailed him an order to report for induction in Brookline, Massachusetts, on September 14, 1953. Since he failed to comply with this order from his local board, he was reported to the United States Attorney in Boston, Massachusetts, as a delinquent in that he had failed to comply with either the order to report for an armed forces physical examination or the order to report for induction. Following this, an indictment against Dr. Cort was secured by the United States Attorney.

Special Registrant

As an individual holding a degree in medicine, Dr. Cort registered as a special registrant on May 25, 1951. The local board ascertained from a newspaper article that he had left the country and was pursuing a course of study at the University of Cambridge in England. On September 11, 1952, the local board classified him in Class I A M as a doctor available for induction in the armed forces.

On January 14, 1953, the local board received a communication from Dr. Cort requesting that he be considered for an occupational deferment principally because of his allegation that in July of 1953 he would become an instructor at the Harvard Medical School. On February 3, 1953, the Massachusetts Advisory Committee addressed a communication to Dr. Cort's local board and recommended that he be considered as available for active military

service. On February 9, 1953, as a special registrant, he was mailed an order to report for an armed forces physical examination at a military examining facility at Frankfurt on the Main, Germany. He failed to comply with this order.

As a matter of explanation of the actions taken with respect to Dr. Cort, the local board processed him for induction as a regular registrant after he became delinquent as a special registrant by failing to comply with the order to report for a physical examination mailed to him on February 9, 1953. While he was delinquent both as a special registrant and as a regular registrant, the order to report for induction which was mailed to him on August 13, 1953, and with which he failed to comply was based upon his liability as a regular registrant. He has evaded military service from September 14, 1953, to the present time. Should he return to the United States, he is subject to immediate prosecution under the outstanding indictment secured by the United States Attorney in Boston, Massachusetts.

[fol. 164] We are transmitting herewith photostatic copies of Dr. Cort's selective service files, one as a special registrant and one as a regular registrant. We would appreciate the return of these photostatic copies after you have extracted such information as you may deem necessary.

For The Director,

/s/ Daniel O. Omer
DANIEL O. OMER
Colonel, JAGC
General Counsel

Enclosures

☆ U. S. GOVERNMENT PRINTING OFFICE 1961 992062 12-8

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No.

CHRISTIAN A. HERTER, SECRETARY OF STATE, APPELLANT

v.

JOSEPH HENRY CORT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge District Court holding Section 349(a)(10) of the Immigration and Nationality Act of 1952 unconstitutional is set forth in the Appendix, *infra*, pp. 10–18.

JURISDICTION

The judgment of the District Court holding Section 349(a)(10) of the Immigration and Nationality Act of 1952 unconstitutional, declaring appellee to be a citizen of the United States and enjoining the Secretary of State from denying him a passport on the ground that he had been expatriated, was entered on October 25, 1960. Appendix, *infra*, pp. 19–20. A notice of appeal to this Court was filed in the District

Court on October 27, 1960.[1] The jurisdiction of this Court to review on direct appeal the judgment of a three-judge District Court enjoining the enforcement of an Act of Congress is conferred by 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction of an action for a declaratory judgment of United States nationality and injunctive relief brought by a person residing abroad who claims that he has been denied a right as a United States national, or whether the exclusive remedy in such a case is that provided by Section 360 (b) and (c) of the Immigration and Nationality Act of 1952.

2. Whether Congress has the constitutional power to provide, as it did in Section 349(a)(10) of the Immigration and Nationality Act of 1952, for the expatriation of a native-born citizen who, in time of national emergency, remained outside the jurisdiction of the United States for the purpose of evading or avoiding service in the armed forces of the United States.

STATUTES INVOLVED

The Immigration and Nationality Act of 1952, 66 Stat. 163, provides in pertinent part:

> SECTION 349(a)(10), 66 Stat. 267–268:
>
> (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

[1] An amended notice of appeal to correct the date given as the entry of the judgment of the district court was filed on November 1, 1960.

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

SECTION 360 (b) and (c), 66 Stat. 273–274:

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Sec-

retary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

STATEMENT

Appellee, who had been born in the United States and was residing abroad, was denied a passport to return to this country by the Department of State following its determination that he had lost his citizenship under Section 349(a)(10) of the Immigration

and Nationality Act of 1952, *supra*, pp. 2–3, by remaining outside the United States during a period of national emergency to avoid service in the armed forces of the United States. He filed suit against the Secretary of State in the District Court for the District of Columbia seeking declaratory and injunctive relief. In the complaint he alleged that he had not remained abroad to evade his military obligation and that Section 349(a)(10) was unconstitutional. The Secretary of State, by motion to dismiss, and in his answer, asserted *inter alia* that the District Court was without jurisdiction to entertain the declaratory judgment action because Section 360 (b) and (c) of the Immigration and Nationality Act of 1952, *supra*, pp. 3–4, provided the exclusive remedy for one residing abroad who claimed a denial of citizenship rights, and also that Section 349(a)(10) was constitutional.

Both parties moved for summary judgment before a three-judge District Court convened under 28 U.S.C. 2282, 2284. The court (on October 11, 1960) filed an opinion granting appellee's motion, and holding (1) that the government had shown by clear, convincing, and unequivocal evidence that appellee had remained abroad to evade his military obligation; (2) that the court had jurisdiction of the declaratory judgment action; and (3) that Section 349(a)(10) was unconstitutional (Appendix, *infra*, pp. 10–18).

THE QUESTIONS ARE SUBSTANTIAL

Two questions are posed on this appeal—the jurisdiction of the District Court and the constitutionality of the denationalization statute. Both are manifestly substantial and call for resolution by this Court.

1. The substantiality of the constitutional issue as to the power of Congress to provide for loss of nationality for departing from or remaining outside this country in order to evade military service requires no elaboration. This was the issue upon which this Court noted probable jurisdiction in *Mackey* v. *Mendoza-Martinez,* in the October Term, 1958 (359 U.S. 933), dealing with the validity of Section 401(j) of the Nationality Act of 1940, as amended, the direct predecessor of Section 349(a)(10) of the 1952 Act.[2] While the Court did not reach the question of the validity of Section 401(j), remanding that case after argument to the District Court to resolve an issue of collateral estoppel (362 U.S. 384), the District Court, on remand, found the doctrine of collateral estoppel inapplicable and adhered to its former decision that Section 401(j) is unconstitutional. The government has noted an appeal from that judgment, and the jurisdictional statement in that case is being filed simultaneously with this one. The considerations supporting the constitutionality of the statute are discussed in the government's brief on the merits in *Mendoza-Martinez,* at the last term (No. 29, O.T. 1959).

2. The jurisdictional issue is also important since it deals with the recurring problem of what procedures are available to persons residing abroad claiming

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[2] The Court had twice previously granted certiorari on this issue (among others) for a hearing on the merits (*Gonzales* v. *Landon*, 349 U.S. 943, 350 U.S. 920; *Perez* v. *Brownell*, 352 U.S. 908, 356 U.S. 44). The Court has four times heard argument on the validity of Section 401(j).

rights of American citizenship. The District Court's conclusion that Section 360 (b) and (c) of the Immigration and Nationality Act of 1952, *supra*, pp. 3–4, do not provide the exclusive remedy for persons outside the United States asserting a claim of citizenship is, we believe, contrary to the intent of Congress.

Section 503 of the Nationality Act of 1940, the predecessor of Section 360, had provided that any person (within or without the United States) claiming a denial of citizenship rights could institute, in the District Court for the District of Columbia or the district in which he claimed permanent residence, an action for a judgment declaring him to be a national of the United States. One instituting the suit from outside the United States could obtain from a United States diplomatic or consular officer a certificate of identity and be admitted to the United States on the condition that he would be subject to deportation if it was decided that he was not a national. Section 360(a) of the 1952 Act continued, with certain exceptions, the right of a person who is *within* the United States to maintain such a declaratory judgment action under the Declaratory Judgment Act (28 U.S.C. 2201) in order to determine nationality status. The Senate Judiciary Committee, after investigation, concluded that "section 503 * * * ha[d] been used, in a considerable number of cases, to gain entry into the United States where no such right existed". S. Rept. No. 1515, 81st Cong., 2d Sess., p. 777. Congress therefore decided to withhold this remedy from those residing abroad. It restricted the remedy of declaratory relief to those who were within the United States. *Id.*

at 810. A different exclusive remedy available to those not residing in the United States was provided for in Section 360 (b) and (c). As described in the Senate Report accompanying the 1952 Act (S. Rept. No. 1137, 82d Cong., 2d Sess., p. 50):

> The bill * * * provides that any person who has been physically present in the United States but who is not within the United States who claims a right or privilege as a national of the United States and is denied such right or privilege by any government agency may be issued a certificate of identity for the purpose of traveling to the United States and applying for admission to the United States. *The net effect of this provision is to require that the determination of the nationality of such person shall be made in accordance with the normal immigration procedures. These procedures include review by habeas corpus proceedings where the issue of the nationality status of the person can be properly adjudicated.* [Emphasis added.]

See, similarly, H. Rept. No. 1365, 82d Cong., 2d Sess., p. 87.

It would seem, therefore, that, by Section 360 (b) and (c) of the 1952 Act, Congress intended to prevent persons residing abroad who claim a denial of citizenship rights from seeking relief by way of a declaratory judgment suit, and instead relegated them to the procedures outlined in Section 360 (b) and (c). This was the position adopted in *Sato* v. *Dulles,* 183 F. Supp. 306 (D. Haw.), affirmed by the Court of Appeals for the Ninth Circuit on May 5, 1960, No. 16279. See also *D'Argento* v. *Dulles,* 113 F. Supp. 933 (D.D. C.); but cf. *Tom Mung Ngow* v. *Dulles,* 122 F. Supp. 709 (D.D.C.)

CONCLUSION

It is therefore respectfully submitted that the Court should note jurisdiction of this appeal.

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DECEMBER 1960.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 868-60

JOSEPH HENRY CORT, PLAINTIFF

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE, DEFENDANT

Opinion

Before EDGERTON, Circuit Judge, and TAMM and MATTHEWS, District Judges

MATTHEWS, *District Judge:* The plaintiff, a citizen of the United States by birth, has been declared to have lost his American citizenship by reason of remaining outside the United States for the purpose of avoiding training and service in the armed forces of this country. He has been refused a passport on which to return from abroad. He denies the purpose attributed to him and also challenges the validity of the law under which his loss of citizenship was declared. This law, Section 349(a)(10) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U.S.C. 1481(a)(10),[1] provides:

> (a) * * * a person who is a national of the United States whether by birth or naturalization, shall lost his nationality by:
>
> * * * * * *
>
> (10) departing from or remaining outside of the jurisdiction of the United States in time

[1] Section 401 of the Nationality Act of 1940, 54 Stat. 1168, was amended in 1944 by adding a subsection (j), 58 Stat. 746. Section 401(j) was reenacted in the Immigration and Nationality Act of 1952 in Section 349(a)(10).

> of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

The plaintiff was born in Boston, Massachusetts, on December 27, 1927. He is a physician and research physiologist. In May 1951, he departed from the United States for temporary work in England. His draft board in Brookline, Massachusetts, ordered him to report in September 1953 for induction into the armed forces of the United States but he did not appear and thereafter was indicted on the charge of having failed to comply with the order. At the instance of the United States the British Government refused to renew the plaintiff's residence permit. Instead of returning to the United States he traveled to Czechoslovakia where he was and is employed. In 1959 he applied for a United States passport to enable him to return to this country. The Passport Office of the Department of State made an administrative decision that the plaintiff had expatriated himself by remaining outside the United States for the purpose of avoiding service in the armed forces and refused him a passport. Early in 1960 the Department's Board of Review on the Loss of Nationality affirmed the decision of the Passport Office.

Shortly thereafter plaintiff brought this suit for a judgment declaring him to be a citizen of the United States. He seeks an interlocutory and permanent injunction to restrain the enforcement and execution

of the challenged provision of law. He contends that Congress is without power to attach loss of citizenship as a consequence of avoiding service in the armed forces by remaining abroad. He also argues that such an exercise of power would violate the Due Process Clause of the Fifth Amendment to the United States Constitution as well as the prohibition against cruel and unusual punishments in the Eighth Amendment. On the plaintiff's application this three-judge statutory court has been convened to hear and determine the case.[2]

A motion for summary judgment has been filed by the plaintiff and also by the Government. In addition the Government has moved to dismiss the action, asserting that the plaintiff has failed to pursue his exclusive remedy for obtaining a review of his citizenship status. This exclusive remedy, according to defendant, is provided by Section 360 (b) and (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273–274, 8 U.S.C. 1503 (b) and (c).

We will first give consideration to the ground advanced in support of the motion to dismiss. It is provided in subdivision (b) of Section 360 that any person who is not within the United States and who is denied a right or privilege upon the ground that he is not a national of the United States may make application to a diplomatic or consular officer for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for

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[2] 28 U.S.C. 2282 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

admission. Subdivision (c) of that section provides that if such person is granted and in possession of a certificate of identity he may then apply for admission to the United States at any port of entry, and if it is finally determined by the Attorney General that such person is not entitled to admission then such determination is subject to review by any court of competent jurisdiction "in habeas corpus proceedings and not otherwise."

Section 360 may well be thought to provide an exclusive remedy for a person outside of the United States who has sought and obtained a certificate of identity and who has applied for admission to the United States at a port of entry. But we need not determine that question. The language of the section shows no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures outlined in subsections (b) and (c). Neither does the section indicate that such persons are to be denied existing remedies. The legislative history of the section does not require such a construction. *Cf. Frank* v. *Rogers*, 102 U.S. App. D.C. 367, 253 F. 2d 889; *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709 (D.C. D.C.). Subsections (b) and (c) were designed to regulate, not to require, the use of certificates of identity.

While the plaintiff might have applied for a certificate of identity for the purpose of following the procedure set forth in Section 360, there is nothing in this case to indicate that he ever did or that such a certificate has been issued to him. Instead, he has chosen to bring this action under the Declaratory Judgment Act for a judgment declaring him to be a United States citizen.

We hold that the complaint in this case presents a controversy to which the judicial power extended

under the Constitution, and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act and the Administrative Procedure Act.[3] *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239–241, 244; *Perkins* v. *Elg*, 69 App. D.C. 175, 99 F. 2d 408, affirmed 307 U.S. 325; *Tom Mung Ngow* v. *Dulles*, supra; *Frank* v. *Rogers*, supra. The motion to dismiss is denied.

When, as here, a citizenship claimant establishes his birth in the United States the burden is upon the Government to prove by clear, convincing and unequivocal evidence the act it relies upon to show expatriation. *Nishikawa* v. *Dulles*, 356 U.S. 129, 133. We think the Government has met this burden. In 1951 when the plaintiff went abroad it was for a limited period. On December 29, 1952, he accepted a position at the Harvard Medical School to begin the latter part of 1953, and indicated that he had made arrangements for prior transportation to the United States. His intention to return to this country was steadfast until he learned shortly after January 31, 1953, that the school authorities felt that they could not declare him "essential" for teaching, and that he probably would be drafted. He wrote them on February 10, 1953, that until he heard "something definite" from the draft board he was "reluctant to take a decision that may prove to be foolish or premature." On February 9, June 4, and July 3 in 1953 the draft board sent him notices to report for physical examination, and thereafter ordered him to report for induction on September 14, 1953. The plaintiff made no response or compliance but remained abroad. We are convinced that his purpose was to avoid service in the armed forces.

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[3] Declaratory Judgment Act of June 14, 1934, 48 Stat. 955, as amended, 28 U.S.C. 2201. Administrative Procedure Act of June 11, 1946, 60 Stat. 237, as amended, 5 U.S.C. 1001.

The only question left in this case is the constitutionality of the law under which the Government maintains that the plaintiff was divested of his citizenship.

At the threshold of this issue we are faced with the decision of the Supreme Court in *Trop* v. *Dulles*, 356 U.S. 86. There Trop, the plaintiff, had been a private in the United States Army, serving in French Morocco. A general court-martial had convicted him of desertion and sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge. Some years after his return to the United States he applied for a passport. It was denied on the ground that by reason of his conviction and dishonorable discharge for wartime desertion he had lost his citizenship under the provisions of Section 401(g) of the Nationality Act of 1940, as amended.[4] Trop sued for a judgment declaring him

[4] 54 Stat. 1168, 1169, as amended, 58 Stat. 4, 8 U.S.C. 1481(a)(8):

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

* * * * *

"(g) deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to the effective date of this Act, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom. * * *"

to be a citizen. The issue was whether his expatriation for desertion in war time comported with the Constitution. The Government's motion for summary judgment was granted and the Court of Appeals for the Second Circuit affirmed. But the Supreme Court reversed, holding Section 401(g) unconstitutional, Mr. Justice Frankfurter, Mr. Justice Burton, Mr. Justice Clark and Mr. Justice Harlan dissenting.

The concept of the Chief Justice's opinion in *Trop*, in which three of his colleagues concurred, is that the purpose of Section 401(g) is "punishment" of a convicted deserter and hence, that "the statute is a penal law", P. 97, and that even if "it is assumed that the power of Congress extends to divestment of citizenship" the use of such divestment as punishment is barred by the Eighth Amendment's prohibition against cruel and unusual punishment. Pp. 99, 101. A fifth member of the Court, Mr. Justice Brennan, agreed that Section 401(g) is beyond the power of Congress, but on the ground that "the requisite rational relation between this statute and the war power does not appear * * *." P. 114. The rationale of the dissenting opinion in *Trop* is that "Congress was calling upon its war powers when it made such desertion an act of expatriation", P. 121, that expatriation under the Nationality Act is not "punishment", in any valid constitutional sense, that "because denationalization was attached by Congress as a consequence of conduct that it had elsewhere made unlawful, it does not follow that denationalization is a 'punishment' any more than it can be said that loss of civil rights as a result of conviction for a felony * * * is a 'punishment' for any legally significant pur-

poses", P. 124, and that the legislation "is the result of an exercise by Congress of the legislative power vested in it by the Constitution * * *," P. 128.

While the provision involved in *Trop* and the provision here in question are not the same, the Chief Justice pointed out that they are "essentially" alike. P. 93. The former decrees that conviction and dishonorable discharge for desertion in war time give rise to loss of citizenship. The latter decrees such loss for departing from or remaining outside the United States to avoid service in the armed forces during war time or a period of national emergency. The principal opinion in *Trop* comments at pages 93–94 on Section 401(j)—the provision involved here but now known as Section 349(a)(10)—as follows:

> This provision was also before the Court in *Perez*, but the majority declined to consider its validity. While section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial.[5]

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[5] In *Perez* v. *Brownell*, 356 U.S. 44, the petitioner had been declared to have lost his citizenship under Section 401(e) as well as under Section 401(j) of the Nationality Act of 1940. He claimed that both of the sections were unconstitutional. The Supreme Court held in its majority opinion that Section 401(e), which provided for loss of nationality by voting in a foreign election, was constitutional as a reasonable exercise of the power of Congress to deal with foreign affairs. In view of this holding, the Supreme Court did not find it necessary to consider also the constitutionality of Section 401(j).

We perceive no substantial difference between the constitutional issue in the *Trop* case and the one facing us.* The Court's ruling there is controlling here. Otherwise, Judge Tamm and I, for reasons expressed in the dissenting opinion, would uphold the validity of the provision under which the plaintiff was declared to have lost his citizenship. We all conclude that subdivision 10 of Section 349(a) of the Immigration and Nationality Act of 1952 is unconstitutional.

Accordingly the motion of the plaintiff for summary judgment is granted and that of the defendant is denied.

/s/ HENRY W. EDGERTON,
United States Circuit Judge.

/s/ EDWARD A. TAMM,
United States District Judge.

/s/ BURNITA SHELTON MATTHEWS,
United States District Judge.

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* In the case of *Mendoza-Martinez* v. *Mackey*, 9 Cir., 238 F. 2d 239, the Court of Appeals affirmed a decision of the District Court upholding the constitutionality of Section 401(j). The Supreme Court granted certiorari and remanded the cause to the District Court, 356 U.S. 258, for reconsideration in the light of *Trop*. On remand the District Court held that Section 401(j) is unconstitutional. Direct appeal was then made to the Supreme Court which noted probable jurisdiction, 359 U.S. 933, and again remanded to the District Court on a collateral issue unrelated to the constitutional question. *Mackey* v. *Mendoza-Martinez*, 362 U.S. 384.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 868–60

JOSEPH HENRY CORT, PLAINTIFF

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE, DEFENDANT

Judgment

This case having come before the Court on cross-motions for summary judgment, and the Court having considered the evidence and memoranda filed by the parties and having heard counsel in open court, and finding that there is no material issue of fact and that the plaintiff is entitled to summary judgment as set forth in the opinion of this Court of October 11, 1960, it is by the Court this 25th day of October, 1960,

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff, Joseph Henry Cort, is declared to be, and to have been since his birth, a citizen of the United States of America and to be entitled to all the rights and privileges of a citizen of the United States.

2. That the statute, Section 349(a)(10) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267–268, 8 U.S.C. 1481(a)(10), is unconstitutional.

3. That the certificate of loss of nationality issued by the defendant to the plaintiff on the ground that the plaintiff has expatriated himself and the de-

fendant's decision to that effect are hereby declared to be null and void.

4. That the defendant, Christian A. Herter, Secretary of State, his officers, servants, employees, and attorneys, and all persons in active concert or participation with them be, and they hereby are, enjoined from withholding from the plaintiff a United States passport on the ground that he is not a citizen, or otherwise denying him any of the rights and privileges of a citizen of the United States, on the ground that he is not a citizen.

HENRY W. EDGERTON,
United States Circuit Judge.

EDWARD A. TAMM,
United States District Judge.

BURNITA SHELTON MATTHEWS,
United States District Judge.

No objection as to form:

HAROLD D. RHYNEDANCE, Jr.,
Assistant United States Attorney.

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Van Panhuys, *The Role of Nationality in International Law* (1959) 55
Weis, *Nationality and Statelessness in International Law* (1956) 53

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 20

DEAN RUSK, Secretary of State, *Appellant*

v.

JOSEPH HENRY CORT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the three-judge district court (R. 32-39) is reported at 187 F. Supp. 683.

JURISDICTION

The judgment of the district court, holding Section 349(a)(10) of the Immigration and Nationality Act of 1952, *infra*, pp. 2-3, unconstitutional, declaring that appellee is a citizen of the United States, and enjoining the Secretary of State from denying him a passport on the ground that he is not a citizen, was entered on October 25, 1960 (R. 40-41). Notice of appeal to this Court was filed in the district court on November 1,

1960 (R. 42-44). On February 20, 1961, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 49). 365 U. S. 808.

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction of this action for a declaratory judgment of United States nationality and injunctive relief brought by a person residing abroad who claims that he has been denied a right as a United States national, or whether the exclusive remedy in such a case is that provided by Section 360(b) and (c) of the Immigration and Nationality Act of 1952.

2. Whether Congress has the constitutional power to provide, as it did in Section 349(a)(10) of the Immigration and Nationality Act of 1952, for the expatriation of a native-born citizen who, in time of national emergency, remained outside the jurisdiction of the United States for the purpose of evading service in the armed forces of the United States.

STATUTES INVOLVED

1. The Immigration and Nationality Act of 1952, 66 Stat. 163, provides in pertinent part:

SEC. 349(a)(10) [66 Stat. 267-268]:

> (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
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> * * * * *
>
> (10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for

the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

SEC. 360 [66 Stat. 273-274]:

(a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

(b) If any person who is not within the United States claims a right or privilege as a national of

the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally ex-

cluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

2. Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171-1172, provided:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he ap-

proves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided.

STATEMENT

On March 23, 1960, the appellee filed suit in the District Court for the District of Columbia against the Secretary of State seeking declaratory and injunctive relief overturning the State Department's denial of his application for an American passport on the ground that he had lost his citizenship, under Section 349(a)(10) of the Immigration and Nationality Act of 1952, *supra*, pp. 2-3, by remaining outside the United States during a period of national emergency for the purpose of evading or avoiding service in the armed forces of the United States. In his complaint, appellee alleged, *inter alia*, that he had not remained abroad to avoid his military obligation, and that Section 349(a)(10) was unconstitutional (R. 1-6).

The Secretary of State, by motion to dismiss (R. 17) and in his amended answer (R. 23-26), asserted that the district court was without jurisdiction to entertain the declaratory judgment action because Section 360(b) and (c) of the Immigration and Nationality Act of 1952, *supra*, pp. 3-5, provides the exclusive remedy for one residing abroad who claims a denial of citizenship rights, and also averred that the the complaint failed to raise a substantial constitutional question.

Both parties moved for summary judgment before the three-judge district court convened under 28 U.S.C. 2282 (R. 7, 27). On October 11, 1960, the district court granted appellee's motion for summary judgment (R.

32-39), holding (1) that the court had jurisdiction of the declaratory judgment suit (R. 34-35); (2) that the government had proved by clear, convincing, and unequivocal evidence that appellee had remained abroad to avoid his military obligation (R. 35-36); but (3) that, under the controlling force of *Trop* v. *Dulles*, 356 U.S. 86, Section 349(a)(10) was unconstitutional (R. 36-39).

The pertinent facts may be summarized as follows:

1. Appellee, a physician and research physiologist, was born in Boston, Massachusetts, in 1927. In May 1951 he left this country for England to accept a research fellowship at the University of Cambridge (R. 2, 8, 23, 29, 33, 103-104).[1] A few days before his departure, he had registered as a "special registrant" under the so-called Doctors' Draft Act (R. 2, 24, 104).[2] On September 11, 1952, he was classified 1-A (medical), available for military service (R. 104).

2. On December 29, 1952, appellee accepted a teaching position in the Physiology Department of the Harvard Medical School. In his letter of acceptance he indicated his intention to return to the United States in late June 1953, and his readiness to start work on August 1, 1953 (R. 131-132; see also January 7, 1953, letter to appellee from Professor E. M. Landis,

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[1] Appellee had been issued a United States passport on June 1, 1948, which was renewed on June 19, 1950, for two years (R. 2, 23, 110-112).

[2] Previously, on December 27, 1945, appellee had registered under the regular Selective Service Act with a Brookline, Massachusetts, draft board. On March 5, 1946, following a physical examination he was classified "4-F". On July 5, 1949, he registered with his draft board under the Universal Training and Service Act of 1948, and on September 20, 1949, was classified "3-A" (R. 103-104).

R. 133).[3] On the same date (December 29, 1952) that he transmitted his letter of acceptance, appellee wrote to the Massachusetts Medical Advisory Committee advising that, in July 1953, he would commence teaching at Harvard, and requested a draft deferment on the ground that this "civilian function * * * shall be far more essential to my country than military service" (R. 115-116). On January 29, 1953, the Harvard authorities advised the Massachusetts Medical Advisory Committee that they did not regard Dr. Cort's teaching position as "essential to civilian care needs or medical teaching" (R. 137), and on February 4, 1953, appellee's local board was informed of the Advisory Committee's recommendation that appellee "be considered available for active military service" (R. 117).

Meanwhile, on January 31, 1953, Doctor E. M. Landis of the Department of Physiology at Harvard, sent a letter to appellee informing him of the school authorities' decision that his teaching position was not essential and that he would probably be inducted upon his return to the United States; Dr. Landis suggested that the appellee consider applying for a commission as soon as possible, even while overseas (R. 138). Appellee answered on February 10, 1953, expressing sur-

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[3] Starting with November 28, 1951, the American Embassy in London had sought to have appellee surrender his passport and return to the United States. He did not accede to the Embassy's requests (R. 72-74). Appellee admittedly had been a member of the Communist Party in New Haven, Connecticut, from December 1946 until May 1951, with the exception of August 1948 to July 1949 (R. 69). In November 1951, the policy of the State Department was to deny passports to supporters of the world Communist movement, except for return to the United States. That policy, later embodied in the Passport Regulations (see 22 C.F.R. 51.137, 51.142 (1958)), was ultimately held to be unauthorized under existing statutes. See *Kent* v. *Dulles*, 357 U.S. 116.

prise at these developments. He said that he had assumed "that teaching positions would be essential", that he had heard nothing from his draft board, and that until he heard something definite he was "reluctant to take a decision that may prove to be foolish or premature" (R. 139). Dr. Landis wrote again to appellee, on March 6, 1953, pointing out that since the "services are so desparately in need of M.D.'s", it would be impossible to get him a teaching deferment, and noting that the only way for him to clarify his status was to apply for a commission. Dr. Landis stated that, if appellee was turned down for military service for medical reasons, the Harvard Dean's office could then reconsider his appointment (R. 140). The Harvard correspondence was terminated with a letter from appellee, dated May 29, 1953, indicating that he had heard from his draft board and that his application for employment would have to remain on file (R. 141).

3. On February 9, 1953, appellee's draft board had sent him notification that his request for deferment had been denied and a form ordering that, within 30 days of receipt, he report for a physical examination as a special registrant, either to his local draft board or to the commanding officer of the examining facility in Frankfurt, Germany (R. 118-119). On June 4, 1953, the local draft board sent appellee a notice directing that he report for physical examination at Brookline, Massachusetts, on July 1, 1953 (R. 121). On July 3, 1953, the draft board again sent appellee a notice ordering that he report for a physical examination at Frankfurt, Germany, within 30 days. In the accompanying letter, appellee was directed to notify the local board as to his course of action; otherwise, he was informed, he would "be immediately processed for

Induction" (R. 124-125). On August 13, 1953, the local draft board ordered appellee to report on September 14, 1953, for induction (R. 127, see also R. 126, 128, 129-130). Appellee has at all times conceded that he received these notices in 1953 and that he failed to report as directed (R. 2-3, 9, 54-55, 77, 90, 91-92, 94-95, 98, 104, 108-109).[4]

On December 17, 1954, an indictment was returned against appellee in the United States District Court for the District of Massachusetts, charging him with having failed to comply with the induction order of September 14, 1953 (R. 75). The indictment is still pending. On August 8, 1954, after the British Home Office refused to renew his residence permit, appellee took up residence in Czechoslovakia. He has remained there ever since (R. 3, 24, 33, 103).

4. On April 7, 1959, appellee made an application in Prague, Czechoslovakia, for a United States passport (R. 3, 20, 24, 57, 86-87). On October 16, 1959, the Department of State denied this application, finding that he had expatriated himself on September 14, 1953, under the provisions of Section 349(a)(10) of the Immigration and Nationality Act of 1952, *supra*, pp. 2-3 (R. 103). Appellee took an appeal from this decision and was afforded a hearing before the State Department Passport Board of Review at which he was

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[4] In his district court complaint, appellee asserted that he did not appear for induction because he believed that the order was not issued in good faith to secure his presence for military service, that political associations and physical disabilities rendered him unfit for such service; and that he was being ordered to report back in order to be served with a Congressional subpoena, or subjected to other governmental sanction because of his political associations (R. 2-3; see also R. 9, 54-55, 77, 92, 94-95, 98, 105).

represented by counsel. On December 8, 1959, the Board affirmed the finding of expatriation (R. 103-107). On February 8, 1960, the Board's decision was approved by the Legal Adviser of the State Department (R. 102). Appellee's counsel was informed of this adverse decision by letter dated February 10, 1960 (R. 100-101).

In this letter of notification to appellee's counsel, he was informed that, since appellee had exhausted his other remedies, "the Embassy at Prague and the Department are prepared to give prompt consideration to Dr. Cort's request for a certificate of identity upon his execution of a formal application therefor" so that he could avail himself of the remedies afforded by Section 360(b) and [illegible] of the Immigration and Nationality Act of 1952, *supra*, pp. 3-5 (R. 100-101). No such application has ever been filed. Instead, as already noted, *supra*, p. 6, appellee filed the instant suit against the Secretary of State seeking declaratory and injunctive relief.

Following the judgment of the three-judge district court, the government's application for a stay of its mandate was denied. Thereafter, on January 6, 1961, the American Embassy issued a passport to appellee limited for his return to the United States. As of the writing, appellee has not returned to the United States.

5. In the course of the administrative and judicial proceedings, appellee filed various affidavits in which he stated that he did not depart from this country, or remain abroad, for the purpose of avoiding his military obligations (R. 51-55, 60, 88-92, 94-95), but in order to

[1] A transcript of this hearing is in the original record on file with the Clerk of this Court.

pursue his professional career or to avoid legislative investigations or possible criminal prosecution which he thought might follow upon his return to this country.

SUMMARY OF ARGUMENT

At the outset we point out, since the Court postponed the question of its jurisdiction, that the Court clearly has jurisdiction under 28 U.S.C. 1252, providing for a direct appeal from any decision of any court of the United States, in a government case, invalidating an Act of Congress. Here, the district court held Section 349(a)(10) of the Immigration and Nationality Act of 1952 unconstitutional, and appeal properly lies to this Court regardless of whether the court below had jurisdiction to proceed as it did.

I

A. The language and legislative history of Section 360(b) and (c) of the Immigration and Nationality Act of 1952, *supra*, pp. 3-5, together with the statute's historical antecedents, show that Congress intended those subsections to provide the exclusive remedy for testing citizenship claims of persons residing abroad and that the present declaratory action should have been dismissed.

1. a. Before the adoption of the Nationality Act of 1940, it was the judicial consensus that persons residing abroad claiming to be American citizens could test their citizenship claims in exclusion proceedings only. In those proceedings the administrative determination of the facts of the citizenship claim was conclusive if supported by substantial evidence. Judicial review, by *habeas corpus*, was strictly limited to the

question of the legality of the detention. *United States v. Ju Toy*, 198 U.S. 253, 263; *Vo Fung Hee v. White*, 259 U.S. 276, 282. And while the remedy available to a *resident* citizenship claimant was subsequently enlarged to include an action for declaratory relief under the Declaratory Judgment Act of 1934 (see *Perkins v. Elg*, 307 U.S. 325), no similar *de novo* relief was recognized as being available to the citizenship claimant who resided abroad.

b. The legislative history of the Nationality Act of 1940 shows that Congress understood the then existing law as we have just described it, and, since the Nationality Act of 1940 was "cutting off the claim to citizenship of [] thousands of persons" (86 Cong. Rec. 13247), decided to ameliorate the rigors of the existing law and adopt a new method by which non-resident citizenship claimants might have fuller judicial review. The result was Section 503, under the broad terms of which a citizenship claimant, whether here or abroad, was authorized to institute a declaratory judgment suit in the federal courts to have his citizenship claim determined *de novo* whenever his alleged rights of citizenship had been denied by the administrative authorities.

c. The liberality of Section 503, however, soon gave rise to unforeseen problems. The citizenship claims of non-residents, primarily based on self-serving oral assertions, often presented great difficulties for fair adjudication because of differences in language and culture, as well as the fact that they usually involved events long past, which had occurred thousands of miles away. See *Lin Shew v. Acheson*, 110 F. Supp. 50, 54-55 (data collected) (N.D.Cal.), vacated and remanded *sub nom. Lin Shew v. Dulles*, 219 F. 2d 413 (C.A. 9). Con-

cern with the mushrooming dimensions of the problems created by these cases, and the opportunity Section 503 presented for fraudulent entry, prompted Congress, when it undertook a general review of immigration and nationality law (the results of which were later embodied in the 1952 Act), to introduce a new remedial procedure.

2. a. In 1950, the Senate Committee of the Judiciary recommended that the declaratory judgment remedy of Section 503 be limited to *resident* citizenship claimants only (S. Rept. No. 1515, 81st Cong., 2d Sess., p. 777), and this was the path staked out in the early legislative proposals (see *e.g.*, S. 3455, 81st Cong.; S. 716 and H.R. 2379, 82d Cong., 1st Sess). These early proposals soon met criticism on the ground that they provided no remedy at all for citizenship claimants residing abroad. To remedy this gap, the Deputy Attorney General recommended that the overseas claimants be required to go to a port of entry of the United States and test their claims within the framework of the exclusion procedures of the Immigration and Naturalization Service; under this method the claim could be properly screened, investigated, and determined by an expert agency. See Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., p. 711.

From these early differences of view, two different plans emerged. On the one hand, the House bill retained the declaratory judgment route, with certain safeguarding limitations, for citizenship claimants here and abroad. H. Rept. No. 1365, 82d Cong., 2d Sess., on H.R. 5678, p. 87. The Senate version, on the other

hand, rejected declaratory judgment relief for citizenship claimants abroad; instead taking its lead from the Deputy Attorney General's proposal it required that the nationality of a non-resident claimant be initially determined by the Immigration and Naturalization Service "in accordance with the normal immigration procedures" S. Rept. No. 1137, 82d Cong., 2d Sess., on S. 2550, p. 50. After joint consideration of these two divergent proposals, the Senate approach, with minor modifications, was adopted. See H. Conf. Rept. No. 2096, 82d Cong., 2d Sess., pp. 117-118, 127.

b. The net effect of the Congressional deliberation was legislation (Section 360(b) and (c)) which rejected both extremes—the broad scope of Section 503 which Congress believed to have been subject to easy misuse by fraudulent claimants, and the restrictive view of the proposals that there be no remedy at all for citizenship claimants residing abroad. Instead, Congress devised a procedure which would permit a preliminary sifting of the claims of non-residents, and a preliminary development of factual issues by administrative proceedings, before the contested issues, legal or factual, were determined by the courts.

Read against this careful Congressional study of the strengths and weaknesses of the alternatives, the procedure ultimately prescribed by Section 360(b) and (c) cannot fairly be regarded as the mere specification of one of several permissive avenues of relief. That the statute speaks permissively—using "may" rather than "shall"—indicates only that Congress meant that those citizenship claimants abroad who desire to test an administrative denial of citizenship rights may do so. As the legislative material makes

clear, Congress did not mean that they may do so either under the statute or by way of a declaratory judgment action. The history graphically points out that Congress knowingly and deliberately rejected the suggestion that overseas citizenship claimants be allowed to test out their claims directly in the courts without first coming to this country and attempting to establish their rights under the usual immigration procedures. The decision below, recognizing an alternative remedy under the Declaratory Judgment Act, contravenes the express Congressional mandate.

There is certainly a rational basis for requiring a non-resident's citizenship claim first to be determined under the procedures of the Immigration and Naturalization Service. Such claims often pose complex and difficult factual issues even where the loss of nationality stems from an act presumably easy to prove (see, *e.g., Nishikawa* v. *Dulles*, 356 U.S. 129), and the evidence-gathering and the evidence-sifting machinery of the Service is helpful in ascertaining the truth and defining the issues. The suggestion that the immigration procedures of Section 360(b) and (c) are repetitious and unnecessary since the claimant abroad, who has been denied a passport, has already utilized the State Department process overlooks the purpose of the statute. Foreign service officials abroad cannot, in the nature of their situation, conduct detailed and formal hearings of the type available at a United States port of entry, or gather or sift information and evidence. The agency decision abroad is simply the action which triggers the formalized procedures of Section 360(b) and (c)—it is the condition precedent to the administrative review procedure adopted by Congress, not its termination.

After a certificate of identity to travel to the United States has been obtained under subsection (b), the claimant is then required to present himself at the borders of this country and seek entry as a United States citizen. The exclusion proceedings which follow are formalized by statute and implemented by appropriate regulations. The net of these proceedings is that the issue of citizenship is investigated and weighed by authorities who, by virtue of experience, training, and facilities, are able to test and evaluate the factual validity of the claim, and gather the appropriate evidence. Such proceedings are, in short, geared to supply a reviewing court with a full record (including testimony by the claimant), appropriately sifted, containing the pertinent information bearing on the claim to citizenship.

B. It is plain that, if Congress did intend the procedures of Section 360(b) and (c) to be utilized before access to the courts would be available, it had the constitutional power so to provide. See, *e.g.*, *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50-51.

Since there has not as yet been an administrative adjudication of appellee's claim, and no effort by appellee to follow the procedures of Section 360(b) and (c), any question as to the scope and nature of the judicial review ultimately available to him is premature at this stage. While Congress has provided in Section 360(c) that the review of the administrative determination shall be in "habeas corpus proceedings and not otherwise", this settles the form, not necessarily the scope, of the judicial remedy. Cf. *Brownell* v. *Tom We Shung*, 352 U.S. 180, 183, 186. Appellee has not even commenced the administrative procedure required by the statute, and therefore his declara-

tory action seeking a judicial determination should have been dismissed.

II

On the merits, the case comes to this Court with (a) the factual finding by the district court that the government has borne the burden of proving that appellee remained outside United States jurisdiction (in a time of emergency) for the purpose of evading and avoiding military service, and (b) the legal holding that Section 349(a)(10) of the Immigration and Nationality Act of 1952—the expatriation provision which governs appellee's case—is unconstitutional. In the respects pertinent here, Section 349(a)(10) is a continuation of, and the same as, Section 401(j) of the Nationality Act of 1940. Accordingly, we rest on the arguments in our brief in *Kennedy* v. *Mendoza-Martinez*, No. 19, on the power of Congress to enact Section 401(j), and do not repeat them here. We discuss in this brief only the particular circumstances of appellee's case which may be thought to have a bearing on the disposition of his litigation.

A. The record shows that appellee voluntarily remained abroad, after receiving several notices in 1953 from his draft board to report for pre-induction physical examinations and for induction, for the purpose of evading military service. In 1952-1953, he pursued an offer of employment at Harvard Medical School to the point of determining the date on which he would return to the United States and begin his new duties. He abandoned this plan only upon learning that his new position would not lead to his being deferred from the draft. He ignored the suggestion that, if he did not wish to return to this

country until it was clear that he would be taken into the service, he could take his pre-induction physical examination at Frankfurt, Germany. When Great Britain refused to renew his residence permit in 1954, he sought a position in Czechoslovakia, instead of returning to the United States. He seems to have been quite aware that he had lost his United States citizenship. He remained in Czechoslovakia for five years (1954-1959) without seeking a new American passport (his old passport having expired in 1952); and his 1954 residence permit at Prague referred to him as stateless.

B. The fact that appellee (unlike Mendoza-Martinez) did not have another nationality when he lost his American citizenship under Section 349(a)(10) does not affect the power of Congress to provide for his expatriation. In enacting Section 401(j) (the predecessor of Section 349(a)(10)), Congress was aware that many men possessing both United States and Mexican citizenship were fleeing to Mexico to avoid our draft, but Congress was not required to confine its legislation to that precise category.

Separation of nationals from their allegiance, without acquisition or possession of another nationality, is not unique. In this country it was known during our early days; and, ever since the Citizenship Act of 1907 first established statutory provisions for denationalization through performance of specific acts, statelessness has been a possible result of expatriation. The anomalous status of the stateless individual does presents serious problems in the world of today, but these are for the political branches to consider and to solve —and the effort is currently underway. The fact that general expatriation laws may lead in some cir-

cumstances to statelessness is not a reason for judicial invalidation of the legislation.

In this case, there is no reason to believe that the appellee has any true cause for complaint arising out of the fact that his voluntary actions have resulted in his being rendered stateless. He deliberately and freely chose a course of conduct which he knew would lead to his loss of American nationality. He did everything short of becoming a citizen of another country—including the establishment of a new domicile in Czechoslavakia and residence there for seven years—to show that he did not consider himself under obligation to the United States. He now appears to meet the basic requirements for Czechoslavakian naturalization, and there is no cause to infer that his position is any different from that of any other voluntary émigré.

ARGUMENT

Introduction

The threshold question is procedural or jurisdictional—could the appellee, as the three judge district court ruled, properly institute an action for a declaration of American citizenship and thereby challenge the denial by the State Department of his application at Prague, Czechoslavakia, for an American passport on the ground that he had lost his American citizenship, or in order to vindicate his claim to citizenship was he required to use the special procedures fashioned by Congress in Section 360(b) and (c) of the Immigration and Nationality Act of 1952? If this Court finds, as the government urges, that only the procedures of Section 360 were open to appellee, then the judgment of the district court should be reversed on the ground that that court lacked jurisdiction to enter-

tain this action. But if the Court is of the opinion that appellee's suit for declaratory relief was properly instituted, then the substantive issue presented by the government's appeal is the constitutionality of Section 349(a)(10) of the Immigration and Nationality Act of 1952, providing for loss of United States nationality by one who remains outside the United States in a time of national emergency in order to evade or avoid service in the armed forces of the United States. In Point I, we discuss the jurisdictional question. Point II is devoted to the constitutional issue.

Before turning to these problems, we are required by the Court's Rules (Rule 16(4)) to take account of the fact that the Court did not note probable jurisdiction but postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 49), 365 U.S. 808. Presumably this course was taken because of the government's challenge, in its jurisdictional statement in this Court, to the jurisdiction of the district court over this declaratory action. We believe, however, that the Court clearly has jurisdiction of this appeal even though the district court should not have proceeded with the suit.

Under 28 U.S.C. 1252, a party may appeal directly to this Court from a judgment of a federal district court "holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." This is precisely such a case. The action is a civil one; the Secretary of State is the appellant; and the district court's judgment held an Act of Congress invalid. Section 1252 does not make the jurisdiction of this Court dependent in any way upon the

authority of the lower court to act, but solely upon its decision and upon the parties, as well as the civil nature of the proceeding.

Unfortunately, in our notice of appeal (R. 42) and jurisdictional statement, we referred, not to 28 U.S.C. 1252, but only to 28 U.S.C. 1253, providing for a direct appeal ("[e]xcept as otherwise provided by law") from an order granting an injunction "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Our failure to mention Section 1252 does not, of course, deprive this Court of the plain jurisdiction it would otherwise have under that provision. Accordingly, we believe that there is no need to consider the application of Section 1253 since jurisdiction rests solidly upon Section 1252.

If the scope of Section 1253 is to be considered, we submit that it also supports jurisdiction here even though the Court accepts our contention that this case should not have been heard on its merits by one judge, let alone three judges. It is settled, with respect to Section 1253, that this Court does not have appellate jurisdiction unless the case "required" three judges in the district court.[8] But a case "requires" three judges, in the statutory sense, when the complaint seeks to enjoin enforcement of a federal statute on substantial constitutional grounds, even though there are other grounds on which the decision of the court can and should rest. See 28 U.S.C. 2282; *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73. The prayer in this complaint for an injunction on consti-

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[8] *Wilentz* v. *Sovereign Camp*, 306 U.S. 573, 582; *Rorick* v. *Board of Commissioners*, 307 U.S. 208, 212; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368.

tutional grounds (R. 5) is critical. The case is not taken out of the three-judge class by a defense which may require the dismissal of the entire action without considering the constitutional issue.

I

SECTIONS 360(b) AND 360(c) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 PROVIDE THE EXCLUSIVE PROCEDURES WHEREBY AN INDIVIDUAL WHO HAS BEEN DENIED A RIGHT OF AMERICAN CITIZENSHIP WHILE RESIDING OUTSIDE THE UNITED STATES CAN SEEK VINDICATION OF HIS CLAIM TO CITIZENSHIP.

Section 360 of the Immigration and Nationality Act of 1952 (*supra*, pp. 3-5), establishes special procedures for determining claims to American citizenship by those within and without the country. Subsection (a) covers claimants "within the United States" and provides for a declaratory action against the head of the agency denying the claimant a right or privilege of citizenship—except that such an action for a declaratory judgment cannot be instituted if the issue of citizenship arises in connection with an exclusion proceeding. Subsections (b) and (c) deal with citizenship claimants "not within the United States."[8] The former provides, with limitations, for the issuance abroad of certificates of identity "for the purpose of traveling to a port of entry in the United States and applying for admission." The latter subsection declares that a person issued such a certificate "may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States"; judicial review is to be by habeas corpus "and not otherwise."

The government's position is that appellee—a non-resident "not within the United States"—was required to pursue this remedy afforded him by subsections (b) and (c) of Section 360, and could not choose to litigate his claim to citizenship in a declaratory action in the District of Columbia. Congress has limited the declaratory remedy to citizenship claimants "within the United States."

A. Congress Clearly Intended That the Procedures of Section 360(b) and (c) Should Be the Exclusive Method by Which Citizenship Claimants Abroad Could Challenge An Administrative Denial of Citizenship Rights.

To assess the force and coverage of Section 360(b) and (c) of the Immigration and Nationality Act of 1952, an analysis of the development of the law which preceded its adoption is essential. The terms and immediate legislative history of the statute cannot be understood apart from this background. We therefore begin with these antecedents, and then turn to a consideration of the statute and its direct legislative history, viewed within this frame of reference. Together, these materials show that it was the intent of Congress that Section 360(b) and (c) provide the exclusive mode of relief for citizenship claimants like appellee.

1. The remedies prior to the 1952 Act

a. The pre-1940 cases

Prior to the adoption of the Nationality Act of 1940, 54 Stat. 1137, it was the prevailing judicial view that persons residing abroad could test their citizenship claims only in exclusion proceedings—by habeas corpus—challenging an adverse administrative decision. The administrative determination of the facts of the citizenship claim was deemed to be conclusive if sup-

ported by evidence just as was true of all other disputed issues of fact. Judicial review did not entitle the applicant to a *de novo* trial on the facts but only to the traditional review of the legality of the detention. See *United States* v. *Ju Toy*, 198 U.S. 253, 263; *Chin Yow* v. *United States*, 208 U.S. 8, 12; *Tang Tun* v. *Edsell*, 223 U.S. 673, 675; *Ng Fung Ho* v. *White*, 259 U.S. 276, 282; *Quon Quon Poy* v. *Johnson*, 273 U.S. 352, 358.

These principles found their origin in the *Ju Toy* case, *supra*, decided by this Court in 1905. There, a man of Chinese ancestry, who had previously resided in the United States, sought to re-enter the country after a temporary departure, claiming that he was a native-born citizen. He was excluded by the immigration authorities who found that he had not been born in the United States and was not an American citizen. After exhausting his administrative remedies, the claimant sued out a writ of habeas corpus to test the validity of his detention (he was being held for return to China). The district court, apparently on new evidence, decided that Ju Toy was a native-born citizen and ordered his release. On appeal, the court of appeals certified to this Court the question of the scope of judicial review available to the claimant. Mr. Justice Holmes, speaking for this Court, ordered that the writ be dismissed on the ground that the administrative decision should have been accepted, and formulated this governing principle (198 U.S. at 263):

> The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to

> deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial.

Some fifteen years later, after this principle had been reaffirmed in this Court (see the cases cited *supra*, p. 25), Mr. Justice Brandeis relied upon it in *Ng Fung Ho* v. *White*, *supra*, when he drew a distinction between the judicial review available to nonresident and to resident citizenship claimants. As to the former he cited the *Wu Toy* decision for the rule that "the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing" (259 U.S. at 282). As to the latter (resident claimants), he held that due process "entitled [them] to a judicial determination of their claims that they are citizens of the United States * * *." (*Id.* at 285). The decisive factor was the location, in legal contemplation, of the person seeking judicial relief.[7] And while the remedy available to a resident citizenship claimant was subsequently enlarged to include an action for declaratory relief under the Declaratory Judgment

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[7] This residence test was analogous to the long-recognized distinction between the rights of the alien seeking admission to the United States, and of the resident alien against whom deportation proceedings have been instituted. See, *e.g.*, *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547-548; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660. As this Court phrased that distinction in *Shaughnessy* v. *Mezei*, 345 U.S. 206, 212: "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. * * *. But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned' [citing *Knauff* v. *Shaughnessy*, 338 U.S. 537, 544, and *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 6]."

Act of 1934, 48 Stat. 955-956, as amended, 28 U.S.C. 2201,[*] no similar *de novo* judicial remedy was recognized as available to one residing abroad. The rule of the *Ju Toy* case originated and was largely developed in cases involving applicants of Chinese ancestry, but it was applied generally. See, *e.g.*, *Di Giorlando* v. *Curran*, 2 F.2d 179 (S.D. N.Y.); *Scimeca* v. *Husband*, 6 F.2d 957 (C.A. 2); *Ex Parte Ver Pault*, 86 F.2d 113 (C.A. 2); cf. *Medeiros* v. *Watkins*, 166 F.2d 897, 899-900 (C.A. 2).

In short, when Congress came to consider the Nationality Act of 1940, the prevailing judicial view was that nonresidents claiming United States citizenship were entitled to proceed to establish their claims to citizenship only as part of an immigration proceeding testing their right to be admitted to the country. Such nonresident claimants had no additional right to try out the facts of their citizenship in a *de novo* judicial trial. Only to the extent that the nonresident could show that the administrative authorities in the exclusion proceeding had denied him a fair opportunity to establish citizenship, or had acted in an illegal or improper way, or had abused their discretion, was he entitled to judicial relief.

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[*] See *Perkins* v. *Elg*, 307 U.S. 325, where a resident claimant threatened with deportation who had been denied an American passport brought a declaratory judgment action to determine her citizenship. Cf. *McGrath* v. *Kristensen*, 340 U.S. 162, involving an action by a resident alien, who had previously obtained an exemption from military service, for a declaration that he was nonetheless eligible for citizenship.

b. Section 503 of the Nationality Act of 1940

The legislative history of the Nationality Act of 1940 indicates that Congress understood the law as we have just described it, and, in view of the important effect of the proposed legislation on existing rights of citizenship, thought it necessary to devise a more liberal remedy—the general provision for declaratory relief, embodied in Section 503, *supra*, pp. 5-6. When the House of Representatives was debating Amendment No. 5 of the Conference Report (which later became Section 503),[9] Congressman Jenkins evinced concern as to the meaning and effect of the provision (86 Cong. Rec. 13247). In explaining its purpose, Congressman Rees, one of the House Managers, had this to say (*ibid.*):

> We have a rather new situation here, and that is we are cutting off the claim to citizenship of these thousands of persons under this provision in the bill who do not comply with its terms and therefore it was deemed advisable that some chance be given them to have what might be called their day in court. We have safeguarded the situation extremely carefully and feel that so far as possible we have prevented any abuse of it. It was my contention when this measure was up for considera-

[9] See H. Conf. Rept. No. 3019, 76th Cong., 3d Sess., on H. R. 9980. Section 503 had not been contained in the Draft Code on Nationality which the President had submitted to Congress in 1938. Concern at the absence of a remedy by a citizen claimant overseas had been expressed at the Committee hearings (see Hearings before the House Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., pp. 285-286). Section 503 came into the bill as a Senate amendment and was adopted with no debate by that body (see S. Rept. No. 2150, 76th Cong., 3d Sess., p. 4; 86 Cong. Rec. 12818). Following the debate adverted to in the text (*infra*, pp. 28-29), it was adopted in the House (86 Cong. Rec. 13250).

> tion in the committee that such people did have the right to go into court either on a declaratory judgment or under a writ of habeas corpus, but there was a feeling on the part of others that they may not have that right.

See also 86 Cong. Rec. 13248.

Congress—or at least the majority of its members most intimately concerned with questions of citizenship status under the 1940 Act—took the prevailing law to be that citizenship claimants outside the United States had only a limited and narrow right to vindicate claims to citizenship. Since the Nationality Act of 1940, as Congressman Rees put it, was "cutting off the claim to citizenship of * * * thousands of persons" —through the new loss-of-nationality provisions embodied in the Act [10]— it was decided to ameliorate the rigors of the existing law and to provide a more liberal method by which these claimants might have their day in court.

This new remedy (Section 503) was drawn in the broadest terms. Under its provisions, a claimant whose citizenship was denied by administrative authorities could institute a declaratory judgment suit in the federal courts to determine his right to citizenship, whether he was physically in the United States or abroad. Cf. *Mah Ying Og* v. *McGrath*, 187 F.2d 199, 201-202 (C.A.D.C.). The section further authorized the claimant to apply for a certificate of identity in order to travel to the United States to prosecute the suit personally. See *supra*, pp. 5-6.

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[10] The Act contained provisions relating to (i) previous residence as a prerequisite to the retention of American nationality by certain persons born abroad as Americans (Section 201(g)-(h)), and (ii) various acts leading to loss of American nationality (Sections 401-410). See 54 Stat. 1139, 1168-1171.

c. Unforeseen effects of Section 503

The liberality of this new remedy soon triggered unforeseen consequences. Though Section 503 was little used in the years immediately following its enactment,[11] starting in 1947 an increasing number of suits began to pile up, primarily as the result of actions by persons of Chinese birth claiming to be the foreign-born children of American citizens. Beginning with August 1947, when the first Chinese case under Section 503 was commenced in the federal courts (*Mah Ying Oy* v. *McGrath*, 187 F.2d 199, *supra*), by the end of 1952, 1288 such cases were instituted under that section by Chinese claimants. See *Ly Shew* v. *Acheson*, 110 F. Supp. 50, 54-55 (data collected) (N.D. Cal.), vacated and remanded *sub nom. Ly Shew* v. *Dulles*, 219 F.2d 413 (C.A. 9); *Dong Wing Ott* v. *Shaughnessy*, 116 F. Supp. 745, 751-752 (S.D. N.Y.), affirmed, 220 F.2d 537 (C.A. 2), certiorari denied, 350 U.S. 847. These cases presented special and complex problems for the federal courts. Almost all of the claims involved factual issues difficult to resolve since they were based on self-serving oral assertions with respect to events occurring years before, thousands of miles away, and were almost impossible to evaluate due to barriers of language and culture.[12]

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[11] There are apparently only four reported cases in which Section 503 relief was sought in the first five years after its adoption. See Note, Wis. L. Rev. (1950) 677, 682, n. 27.

[12] A discussion of the scope and nature of this problem is contained in the government's brief in *Lee Kum Hoy* v. *Shaughnessy*, No. 32, O.T. 1957, pp. 21-33. See also the Annual Report of the Attorney General for 1956, pp. 111-113, and for 1957, pp. 121-123; cf. *Ly Shew* v. *Acheson*, *supra*.

2. The Remedy Adopted in Section 360 of the Immigration and Nationality Act of 1952

Congress was aware of this problem when it undertook the general review of immigration and nationality legislation ultimately resulting in the 1952 Act; and it was prompted to fashion a new remedy for the new statute. After considering a number of proposed solutions, Congress devised a procedure which may be characterized as midway between the strict principle of the *Ju Toy* case *supra*, pp. 24-26) and the liberality of Section 503—one which would provide a remedial route for overseas citizenship claimants and yet avoid the pitfalls which Congress believed to inhere in the procedure under Section 503 of the 1940 Act.

a. The legislative history of Section 360

(*1*) In 1950, the Senate Committee on the Judiciary —which in 1947 had been authorized (pursuant to S. Res. 137) to commence a full and complete investigation into the adequacy of existing immigration laws— reported its dissatisfaction with the Section 503 procedure and recommended that its provisions be radically revamped. The Committee noted that "the section has been subject to broad interpretation, and that it has been used, in a considerable number of cases, to gain entry into the United States where no such right existed." It recommended "that the provisions of section 503 * * * be modified to limit the privilege [of declaratory relief] to persons who are in the United States, and that any such action shall be brought within 5 years after the finding that the person is not a national of the United States." S. Rept. No. 1515, 81st Cong., 2d Sess., p. 777.

The Senate Committee bill (S. 3455, 81st Cong.) which accompanied this report carried out this aim.

Section 359 provided for declaratory relief only for claimants in the United States.[13] No provisions were included for testing the citizenship claims of non-residents. The Immigration and Naturalization Service favored this approach, commenting, in its analysis of the measures, that by limiting declaratory relief "to persons within the United States, the bill will remove from the law one method of obtaining easy entry into the United States, which is regarded as a satisfactory addition to the law."[14]

(2) These early proposals met criticism from several sources. A number of witnesses who testified at the joint hearings conducted by the Senate and House Judiciary Committees in March and April 1951, on the early bills and on a bill introduced by Congressman Celler (H.R. 2816, which retained the substance of Section 503),[15] expressed concern over the deletion of a procedure under which citizenship claimants abroad could test the administrative denial of citizenship rights. *E.g.*, Hearings, pp. 106-109, 338-339, 443, 522, 527, 673.[16] The Deputy Attorney General, in his statement to the Committees, also objected to the adoption

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[13] A similar provision was contained in Section 360 of the revised bills introduced in the first session of the 82d Congress, both in the Senate (S. 716) and in the House (H.R. 2379).

[14] See Analysis of S. 716, a Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality: And for other Purposes, p. 360-3.

[15] Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., hereinafter referred to as "Hearings, p. ."

[16] One recommendation which gained support (see *infra*, pp. 33-34, 36) was to permit a declaratory judgment action for citizenship claimants abroad only if they had been physically present in the United States at some prior time. Hearings, pp. 108-109.

of the proposed remedy unless it was amended to provide for the protection of claimants abroad who had more than a frivolous claim to American citizenship. The thrust of the proposal of the Department of Justice was that citizenship claimants abroad "shall be required to apply for admission to the United States at a port of entry and go through the usual screening, interrogation, and investigation, applicable in the cases of other persons seeking admission to the United States, so that the Immigration and Naturalization Service will have as complete a record as possible on each person entering this country claiming to be a national thereof" (Hearings, pp. 711, 721).

(3) From these early recommendations two different solutions to the problem emerged in the later House and Senate versions of what was to become the Immigration and Nationality Act of 1952.

The House version retained the declaratory judgment procedure with some limitations, whether the claimant was here or abroad at the time his right of citizenship was denied. As explained by the House Judiciary Committee in H. Rept. No. 1365, 82d Cong., 2d Sess., on H.R. 5678, p. 87:

> The bill modifies section 503 of the Nationality Act, as amended. While it substantially retains the provisions applicable to the person within the United States who is seeking by court action to have his claim to citizenship determined, it limits the availability of a certificate of identity to the case of the individual abroad who seeks such determination. *Persons who have been physically present in the United States, or persons born abroad of United States citizen parents, only, may*

institute the court action specified and seek identity certificates under the provision of the bill. [Emphasis added.]

The bill requires institution of proceedings within a period of 5 years after the final administrative denial of a claim to citizenship.

The Senate version, on the other hand, rejected the declaratory judgment route for those residing abroad. Instead, adopting the proposal recommended by the Department of Justice (see *supra*, pp. 32-33), it fashioned a remedy for overseas citizenship claimants within the regular admission machinery utilized by the Immigration and Naturalization Service for persons seeking entry into the country. As the Senate Judiciary Committee described its plan: [17]

> The bill modifies section 503 of the Nationality Act of 1940 by limiting the court action exclusively to persons who are within the United States * * *.
>
> The bill further provides that any person who has previously been physically present in the United States but who is not within the United States who claims a right or privilege as a national of the United States and is denied such right or privilege by any government agency may be issued a certificate of identity for the purpose of traveling to the United States and applying for admission to the United States. The net effect of this provision is *to require* that the determination of the nationality of such person shall be made in accordance with the *normal immigration procedures*. These procedures include review by habeas corpus proceedings where the issue of the nationality

[17] S. Rept. No. 1137, 82d Cong., 2d Sess., on S. 2550, p. 50.

status of the person can be properly adjudicated. [Emphasis added.]

[8] Section 360 of the bill reported by the Senate Committee (S. 2550) provided as follows:

PROCEEDINGS FOR DECLARATION OF UNITED STATES NATIONALITY IN THE EVENT OF DENIAL OF RIGHTS AND PRIVILEGES AS NATIONAL.

SEC. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any deportation or exclusion proceeding under the provisions of this or any other Act, or (2) is in issue in any such deportation or exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe

(4) After joint consideration of these two proposals, the Senate version, with one minor modification,[19] prevailed. See H. Rept. No. 2096, 82d Cong., 2d Sess., pp. 117-118, 127 (Conference Report). Section 360(a) of the Act provides for a declaratory remedy only for citizenship claimants within the country, and even from that class it excepts two situations: (i) those instances in which the issue of citizenship arises in or as part of an exclusion proceeding, and (ii) cases in which the final administrative denial of citizenship rights occurred more than five years before suit was brought. Subsection (b) of Section 360 provides for

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rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

[19] The one change made by the Conference Committee in the Senate version of Section 360 was to provide that the certificate-of-identity procedure in subsection (b) should be applicable to a person under sixteen years who was born abroad of a United States citizen parent, as well as to persons who at some time prior to their application for the certificate had been physically present in the United States (*supra*, p. 4). The Senate bill restricted the certificate procedure to persons who had previously been present in the United States (see fn. 18, *supra*).

the issuance of certificates of identity to claimants "not within the United States," to enable them to come to a port and apply for admission; but such certificates are to be available only to persons who were at some previous time "physically present in the United States" or to those under 16 years born abroad of a United States citizen parent. Under subsection (c), persons issued these certificates have to test their right to admission by applying at a port of entry and pursuing their remedy in exclusion proceedings, and ultimately by habeas corpus "and not otherwise." See *supra*, pp. 3-5.

b. The objectives of Section 360.

In the light of the historical development we have outlined (particularly the experience under Section 503 of the 1940 Act), the immediate legislative history and the terms of Section 360 prove that Congress meant: (1) to restrict the declaratory remedy to citizenship claimants already within the country, and thus to remove the excesses which, in the view of Congress, had followed upon the use of the declaratory remedy (in Section 503) by claimants abroad; (2) to provide a remedy for claimants abroad which would permit a preliminary sifting of the claims and development of the facts in administrative proceedings within the Immigration and Naturalization Service before the contested issues, legal or factual, would be determined by the courts; and (3) to make the special procedures of Section 360(b) and (c) exclusive for citizenship claimants "not within the United States." Thus, the result of the Congressional consideration, in the 1952 Act, was legislation which rejected both extremes—the broad liberality of Section 503 which Congress

believed to have been subject to easy misuse by fraudulent claimants (*supra*, pp. 30-32), and the view expressed in those bills which provided no judicial remedy at all for citizenship claimants outside the United States (*supra*, pp. 31-32). In the case of claimants outside the country, Congress deliberately adopted the Senate provision which was designed—as the Senate report said (*supra*, p. 34)—"*to require*" that the determination of nationality "shall be made in accordance with the normal immigration procedures" (emphasis added).

Nevertheless, the District Court for the District of Columbia has held, contrary to the rulings in several other districts, that a claimant outside the country may, at his option, institute a declaratory action without coming to the United States and going through the administrative immigration process which Congress was so careful to devise.[20] One suggestion in these District of Columbia decisions is that, since the procedures of Section 360(b) and (c) are time-consuming

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[20] In addition to the decision below (R. 35); see, *e.g.*, *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709; *Guerrieri* v. *Herter*, 186 F. Supp. 588; *Schneider* v. *Herter*, decided August 17, 1960, pending on appeal to the court of appeals. Cf. *Frank* v. *Rogers*, 253 F. 2d 889 (C.A.D.C.). Contrary decisions recognizing the exclusivity of the statutory procedures are the rule elsewhere in the federal courts. See, *e.g.*, *Sato* v. *Dulles*, 183 F. Supp. 306 (D. Hawaii); *Yamamoto* v. *Dulles*, 16 F.R.D. 195 (D. Hawaii); *Arina* v. *Brownell*, 112 F. Supp. 15 (S.D. Tex.); *Basma Abed Harake* v. *Dulles*, 158 F. Supp. 413 (E.D. Mich); *Vasquez* v. *Brownell*, 113 F. Supp. 722, 725 (W.D. Tex.); *Matsuo* v. *Dulles*, 133 F. Supp. 711 (S.D. Cal.); *Correia* v. *Dulles*, 129 F. Supp. 533, 534 (D. R.I.); cf *Ferretti* v. *Dulles*, 150 F. Supp. 632 (E.D. N.Y.), affirmed, 246 F. 2d 544, 547 (C.A. 2); *Strupp* v. *Dulles*, 258 F. 2d 622, 624 (C.A. 2); *Samaniego* v. *Brownell*, 212 F. 2d 891, 894 (C.A. 5); *Lew Hsiang* v. *Brownell*, 234 F. 2d 232 (C.A. 7); *Puig Jimenez* v. *Glover*, 255 F. 2d 54, 56 (C.A. 1); *Ficano* v. *Dulles*, 151 F. Supp. 650, 651 (E.D. N.Y.).

and financially burdensome. Congress could not have meant to require that an overseas claimant, who has been denied a citizenship right by an administrative agency overseas, again run the gamut of administrative relief as provided in subsections (b) and (c).[21] But, as we have shown, Congress was of the opinion that the remedy of an action for declaratory judgment by persons thousands of miles away was too easy—that it encouraged fraud and made resolution of issues of fact too difficult. This was Congress's view of the experience with Section 503 of the 1940 Act, under which thousands of overseas claimants of Chinese descent brought declaratory actions as alleged foreign-born children of American parents—in the course of which suits there was grave reason to believe that many frauds had been perpetrated. In the wake of this experience with the 1940 statute, the legislative history of Section 360 shows that Congress knowingly rejected the suggestion that, under the new Act, citizenship claimants residing overseas be allowed to test out their claims to citizenship directly in the courts without coming to this country or pursuing their remedies within the immigration system. The decision below would establish a remedy for such persons which Congress deliberately refused to adopt.

Aside from the possibility of fraud, there is another rational basis for the Congressional conclusion that it would be desirable to have claims of United States

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[21] Congress felt so strongly that the normal immigration procedures should be followed that it withheld the declaratory remedy (in Section 360(a)) from those claimants already "within the United States" if the issue of nationality arose in connection with an exclusion proceeding or was an issue in an exclusion proceeding (*supra*, pp. 3, 23).

nationality considered, in the first instance, by administrative officers in the United States under the normal procedures for hearing and determination which have evolved over the years with respect to immigration matters. Contested claims to United States nationality by persons residing abroad usually involve issues of fact. The existence of such factual issues with respect to derivative citizenship of persons claiming to be children of American parents has been abundantly demonstrated by the Chinese cases. Factual questions requiring investigation also arise frequently in other nationality cases. Thus, where loss of nationality flows from an objective act presumably simple to prove —such as service in a foreign army or voting in a foreign election—there have been difficult problems as to voluntariness. See *Nishikawa* v. *Dulles*, 356 U.S. 129. A superficially simple question like the fact of residence abroad can be complicated by disputed claims that governmental action prevented the coming or return to the United States. See *Montana* v. *Kennedy*, 366 U.S. 308. As to the ground for loss of nationality involved here—intent to evade military service by remaining abroad—the question of intent is always a factual one, often difficult to resolve without a full presentation of all relevant circumstances. See *Gonzales* v. *Landon*, 350 U.S. 920. In the light of the prevalence of such issues, Congress could well have been (and obviously was) impressed with the view expressed by the Deputy Attorney General that citizenship claimants abroad should be required to "go through the usual screening, interrogation, and investigation" applicable to other persons seeking admission, so that there would be as complete an investigation and record as possible (see *supra*, pp. 32-33).

The suggestion that this procedure is unnecessary because a person abroad, who has been denied a passport, has already utilized the State Department procedures ignores the expressed purpose of the mechanism established by Section 360(b) and (c). State Department officials abroad cannot, in the nature of their duties and responsibilities, conduct the type of detailed inquiry and formal hearings available at a port of entry of the United States. The administrative decision abroad is simply the official action which creates the purported injury for which redress is sought—it is the condition precedent to the beginning of the full administrative procedure, not its termination.

The detailed administrative inquiry and procedure Congress desired is that adopted by Section 360(b) and (c). Once denied a citizenship right by the overseas official, the claimant is required to apply for a certificate of identity under subsection (b), for the purpose of traveling to a port of the United States. When such a certificate has been obtained,[22] the claimant may then travel to this country and apply for entry as a United States citizen. Immigration and Naturalization Service officers must then inquire into and pass upon his status in the same manner as they would consider the admissibility of other applicants for entry.

[22] The applicant is entitled to detailed review procedures if the consul denies a certificate (see subsection (b) of Section 360 and 22 C.F.R. 50.24-50.26 (1958)). However, we need not here discuss the question of whether, if the Department of State ultimately refuses to grant the certificate, judicial review is available, since appellee in this case never applied for such a certificate although he was informed that prompt consideration would be given such an application (R. 100-101). See *supra*, p. 11.

The investigatory facilities of the Service are routinely available. The adjudicatory proceedings that follow are formalized by statute (Sections 231-236 of the 1952 Act) and further implemented by regulation (8 C.F.R. 236.1-236.6 (Supp. 1961)). A hearing is required at which the applicant is entitled to counsel and to present all relevant evidence; the special inquiry officer who conducts the hearing must not have participated in the prosecutive or investigative aspects of the case; a formal record of the hearing must be kept and must provide the basis for the hearing officers' decision; the applicant may appeal an adverse decision to the Board of Immigration Appeals; and the decision on appeal must be based on the evidence previously adduced. Judicial review is available through a habeas corpus proceeding. In short, a full administrative hearing—geared to the production and analysis of all pertinent evidence—is afforded the claimant, with appropriate judicial review at the conclusion of the administrative process.

The result is that a full record is likely to be obtained, and the issue of citizenship is initially considered by authorities able, by experience and training, to test the factual validity of the citizenship claim. The claimant is present and can testify himself; there is no need to rely on written self-serving statements not subject to cross-examination. Moreover, the investigatory resources of an expert agency (the Immigration and Naturalization Service) are available to help appraise obtuse and difficult factual allegations, to sift out the manifestly frivolous claim, to illumine and sharpen the basic facts in the issue, and to add new evidence. Such an administrative process can serve

the function of clarifying and narrowing the areas of dispute, and of providing a full record which might not be available in a simple declaratory action instituted from abroad in a district court. This would clearly be a valid reason for Congress to require the exhaustion of administrative procedures before burdening the courts with the necessity of reviewing such citizenship claims.

Finally, it is plain that the central premise underlying Congress's considered decision of how best to mold a remedy for citizenship claimants residing abroad was that the new remedy would be exclusive. It is inconceivable that, in its careful weighing of divergent views (see *supra*, pp. 31-37), Congress intended the procedure ultimately adopted to be nothing more than a permissive avenue of relief to be set in motion only if the applicant so desired. Congress accepted the Senate version of Section 360; and the Senate Committee explicitly declared that the procedures of Sections 360(b) and (c) were *required* to be followed by claimants not within the United States (*supra*, p. 34). Moreover, the careful distinction in Section 360 between declaratory judgment actions by claimants within the United States (Section 360(a)), and habeas corpus review by claimants outside the United States (after exhaustion of immigration remedies) (Section 360(b) and (c)), would be rendered meaningless if the overseas claimant could institute a declaratory action without coming to the United States and following the administrative process which Congress specified.

There would be no purpose to the elaborate statutory machinery.[23]

That the statute speaks permissively, using "may" rather than "shall," means only that those citizenship claimants abroad who desire to test an administrative denial of citizenship may do so by following the procedure prescribed. This language cannot be taken to mean that such claimants may do so either under the statute or by way of an extra-statutory suit for a declaratory judgment. The term "may," instead of "shall," is also used in subsection (a) of Section 360, with respect to claimants within the United States. Certainly, it could not be contended that claimants in that class have the choice of either proceeding under Section 360 (a) or of following some other procedure not subject to the limitations of that subsection (but cf. *Frank* v. *Rogers*, 253 F.2d 889 (C.A.D.C.)). And the same word "may" appeared in Section 360(b) and (c) of the Senate bill (S. 2550) (adopted by the full Congress)—as to which the Senate Committee said: "The net effect of this provision is *to require* that the determination of the nationality of such person [*i.e.*, a claimant not within the United States] *shall* be made in accordance with the normal immigration procedures" (emphasis added) (*supra*, pp. 34-35).

It is a familiar canon that the designation by Congress of a specified mode of redress generally excludes any other. See, *e.g.*, *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297,

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[23] This is not a case, such as *Leedom* v. *Kyne*, 358 U.S. 184, in which the absence of the remedy pursued by the plaintiff would mean that there would be no judicial remedy to vindicate a right given by Congress. In the present situation, the appellee's rights could be vindicated through the procedure established by Section 360 (b) and (c), including judicial review in habeas corpus proceedings.

301, and cases there cited. In this particular statute, Congress not only selected a certain mode of redress but made convincingly clear that it was the only redress that it intended to make available to claimants like this appellee. Since he never utilized this administrative procedure, his action for judicial review was premature and should have been dismissed.

B. Congress Could Constitutionally Require Exhaustion of the Administrative Process, As In Section 360(b) and (c), Before Permitting Resort to the Courts.

There can be no question that if, as we urge, Congress intended the remedy provided by Section 360(b) and (c) to be utilized before resort to the courts, it had the constitutional power so to provide. The doctrines of exhaustion of administrative remedies presupposes that Congress can demand prior resort to the administrative process. Cf. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50-51; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; see *United States* v. *Sing Tuck*, 194 U.S. 161. As Mr. Justice Holmes observed in *Sing Tuck*, where habeas corpus was sought after a preliminary determination that the applicants for entry were not American citizens but before any appeal was taken to the Secretary of Commerce and Labor, as required under the applicable law, "[w]hatever may be the ultimate rights of a person seeking to enter the country and alleging that he is a citizen, it is within the power of Congress to provide at least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed to enter the country without further trial. * * * [B]efore the courts can be called

upon, the preliminary sifting process provided by the statutes must be gone through with" (194 U.S. at 168-169, 170). That a person may have to travel to the United States to establish his claim, although it would be easier to remain abroad while his rights are being determined, is not a valid constitutional reason for failing to apply this well established principle. As noted above (*supra*, pp. 41-42), the type of formal hearing envisaged by Section 360(b) and (c) would not be feasible in foreign countries. It is not irrational to provide that a non-resident claiming United States nationality must seek to establish his claim at a port of the United States.

The record in this case shows that the federal authorities were ready to give immediate consideration to an application by appellee for a certificate of identity to enable him to seek to establish his claim to United States citizenship. See *supra*, p. 11.[24] Since there has not as yet been an administrative determination by the Immigration and Naturalization Service, as contemplated by Congress, any question as to the scope and nature of the ensuing judicial review would be premature. Congress has provided in Section 360(*c*)

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[24] In an early case construing Section 360, the District Court for the District of Columbia seemingly recognized that Section 360(b) and (c) provided the exclusive remedy for citizenship claimants abroad. *D'Argento* v. *Dulles*, 113 F. Supp. 933. The different rule thereafter adopted in *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709, *supra*, p. 38, fn. 20, involved an applicant who had never been in the United States and was not a derivative citizenship claimant under sixteen years of age, and hence was not eligible for travel documents under Section 360(b); cf. *Estevez* v. *Brownell*, 227 F. 2d 38 (C.A. D.C.). Whatever problems that situation may present (*i.e.*, whether, in the absence of another remedy, the general declaratory judgment statute should be deemed available), this case does not involve them. Appellee is statutorily eligible for a certificate of identity.

that review of the administrative proceeding shall be in "habeas corpus proceedings and not otherwise." While this settles the form of the remedy, it does not necessarily determine its scope.[25] It is sufficient for present purposes to note that, even assuming that the question of citizenship is one as to which there must be a judicial trial *de novo* (if the claimant so desires), it was still within the power of Congress to require that the administrative procedure of the Immigration and Naturalization Service be utilized before there could be access to the courts. Cf. *United States* v. *R.C.A.*, 358 U.S. 334, 346-348; *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 62-65; *Far East Conference* v. *United States*, 342 U.S. 570, 574-575.

II

SECTION 349(a)(10) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 IS CONSTITUTIONAL AS APPLIED TO APPELLEE

In the respects pertinent here, Section 349(a)(10) of the Immigration and Nationality Act of 1952, *supra*, pp. 2-3, is the same as Section 401(j) of the Nationality Act of 1940 involved in the *Mendoza-Martinez* case, No. 19), and there are no relevant materials in the immediate legislative history of the 1952 Act bearing on the validity of the substantive provisions of Section 349(a)(10)—except the plain indications that Congress

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[25] While, as indicated, *supra*, pp. 25-26, *United States* v. *Ju Toy*, 198 U.S. 253, holds that a *de novo* trial is not necessary for persons seeking admission, the present force of that ruling has been questioned. See Judge Frank dissenting in *Medeiros* v. *Watkins*, 166 F. 2d 897, 900 (C.A. 2); cf. *Carmichael* v. *Delaney*, 170 F. 2d 239 (C.A. 9). And even though the form of the remedy is habeas corpus, it is possible to have a *de novo* trial on the facts if that is found to be appropriate. Cf. *Brownell* v. *Tom We Shung*, 352 U.S. 180, 183, 186.

was simply carrying forward into the comprehensive new statute the provisions of Section 410(j) of the older Act.

Congress did include in the new Act a provision that "failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States" (*supra*, p. 3). But that presumption is not involved in the present case. The court below did not rely on it, in any way, in holding that appellee's purpose in remaining abroad was to evade military service. Rather, the court first ruled that, upon appellee's proof of his birth in this country, "the burden is upon the Government to prove by clear, convincing and unequivocal evidence the act it relies upon to show expatriation" (citing *Nishikawa* v. *Dulles*, 356 U.S. 129, 133) (R. 35-36). The court then held that "the Government has met this burden" (R. 36). In other words, the court applied Section 349(a)(10) exactly as if it were Section 401(j) of the 1940 Act.

Accordingly, we rest in this case on the arguments in our brief in the *Mendoza-Martinez* case, No. 19, on the power of Congress to enact Section 401(j), and shall not repeat them here as applied to Section 349(a)(10) of the 1952 Act. Just as the statutes are the same, so are the arguments the same, except as the particular circumstances of appellee's case may be thought to have a bearing on the disposition of his litigation. We discuss here only those particular circumstances.

A. Appellee's Voluntary Acts

The record makes clear, as the court below found (R. 36), that appellee voluntarily absented himself from the United States, after receiving several notices from his draft board to report for pre-induction physical examinations and for induction, for the purpose of evading and avoiding military service. He may have initially left the United States for other purposes, but his subsequent behavior shows that he continued to remain abroad for the very purpose referred to in Section 349(a)(10), and that he was deliberately separating himself from his obligations as a citizen.

As early as 1951, appellee refused to accede to the requests of the American Embassy in London that he call at the Embassy with his passport (R. 72-74). The following year, after pursuing an offer of employment in the United States to the point of determining the date on which he would begin his duties in this country, he abandoned his planned return upon learning that he would be required to meet his obligations to the Selective Service System upon his return (R. 131-141). See the Statement, *supra*, pp. 7-10.

Despite the fact that appellee was not required to come to the United States, but was given the option of going to Frankfurt, Germany, for his pre-induction physical examination, he ignored the notices from his draft board to report for a physical examination. See *supra*, pp. 5-10. Any significance which might otherwise be attached to appellee's assertions that he believed himself physically unfit for military service is wholly neutralized by his failure to report for a physi-

cal examination which would have ascertained the facts.[26]

When the government of Great Britain refused to renew appellee's residence permit because of his failure to respond to the induction order of the United States government, he did not attempt to return to this country, but went instead to Czechoslovakia in 1954. Although his passport expired in 1952, he made no effort at that time to obtain a new one. He was admitted to and remained in Czechoslovakia for five years without an American passport (R. 77, 95). At no time between 1954, when he took up residence in Czechoslovakia, and 1959, did he seek to return to the United States or to secure a valid passport.[27] That he was aware that his conduct had extinguished his United States nationality is shown by the fact that the residence permit issued to him in 1954, at Prague, showed him to be stateless (R. 87); and further evidence of his voluntary decision to shun his responsibilities as a United States national is his statement that he took "political asylum" in Czechoslovakia (R. 98).[28]

[26] Findings that appellee was unfit for military service were made in connection with his original status as a regular registrant. Physical requirements for persons called under the doctors' draft were not as stringent as those set for regular service.

[27] Appellee claims that he made no attempt to return to the United States because of the illness of his wife (R. 95). This does not explain his failure between 1952 and 1959, seven years, to secure a passport for travel when his wife's health improved, as it did, since she traveled to the United States alone in 1959.

[28] It is interesting to note that, under the nationality laws of Czechoslovakia, the Ministry of Interior "may withdraw Czechoslovak State citizenship from a person resident abroad if that person (a) Has acted or is acting in a manner hostile to the State or likely to prejudice its interests, or . . . (c) Fails to return to the country within the prescribed time-limit of not less than thirty days

B. Lack of Alternative Citizenship

Unlike Mendoza-Martinez, appellee did not possess dual nationality when he lost his American citizenship. However, we do not believe that this factor affects the power of the United States, at least under the circumstances here, to divest appellee of his United States nationality.

1. We point out in our brief in No. 19 (pp. 35-37, 40-41, 62-63) that the problem presented to Congress in 1944 appeared largely to involve draft evasion by dual nationals of Mexico and the United States. See H. Rep. No. 1229, 78th Cong., 2d Sess., pp. 2-3; 90 Cong. Rec. 3261-2. Those individuals would retain their foreign nationality if they lost their American citizenship, and as to them there would be no problems of statelessness. But Congress had scope in legislating; it was not required to restrict the statute precisely to the dual-national category, but could cover other instances of flight (to avoid the draft) having the same consequences for the United States. Cf. *Perez* v. *Brownell*, 356 U.S. 44, 59-60. The fact that in some cases the individual might become stateless would not destroy Congress's right to enact a general statute providing for expatriation of draft-evaders who leave the country.

2. Release of nationals from their allegiance, without acquisition of a new nationality, is by no means a unique phenomenon. See United Nations Secretariat,

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(if overseas ninety days) from the date on which he receives a summons to return from the Ministry of the Interior." Act No. 194 of 13 July 1949, Concerning the Acquisition and Loss of Czechoslovak State Citizenship, Article 7, United Nations Secretariat, Legal Department, *Laws Concerning Nationality* (1954), pp. 116, 118). Thus appellee, had he been a Czechoslovak citizen, could have been denationalized for his failure to respond to induction orders.

Department of Social Affairs, *A Study of Statelessness*, 139 (1949). Early in the history of this country it was recognized that it was possible for an individual to lose the nationality of his birth without simultaneously acquiring another. In *Caignet v. Pettit*, 2 Dall. 234, it was held that a native of France who had not been naturalized conformably to the terms of the then new United States Constitution was no longer a citizen of France.[29] The court said at p. 235:

> We are clearly of opinion . . . that the plaintiff was not . . . a citizen of France. It is true, that he has not acquired the rights of citizenship here: nor, as it appears, in any other country: but, whatever may be the inconvenience of that situation, he had an undoubted right to dissent from the revolution: and, as a member of the minority, to refuse allegiance to the new government, and withdraw from the territory of France. Everything that could be said or done to manifest such a determination, has been said and done by the plaintiff, except the act of becoming the subject or citizen of another country.

See also *Ex Parte Griffin*, 237 Fed. 445, 450 (N.D. N.Y.).

In more modern times, statelessness has been the possible result of various acts of expatriation. Under the Citizenship Act of 1907, 34 Stat. 1228, loss of American nationality followed upon the taking of an oath of allegiance to a foreign state even though citizenship in that state was not acquired (cf. *Savorgnan v. United States*, 338 U.S. 491). Under the Nationality Act of 1940, 54 Stat. 1137, the same could be true of tak-

[29] He had taken an oath of allegiance to the State of Pennsylvania under a statute which was at the time no longer in effect.

ing a foreign oath of allegiance, voting in a foreign election (cf. *Perez* v. *Brownell*, 356 U.S. 44), renouncing American nationality here or abroad, or committing treason. None of these acts of expatriation was tied to acquisition or possession of another nationality, and thousands of Americans lost their citizenship (especially through voting in foreign elections, or taking oaths of allegiance while serving in foreign armies) without having any other citizenship. The Immigration and Nationality Act of 1952 continues these provisions of the 1940 Act, and adds service in the armed forces of another country (cf. *Federici* v. *Miller*, 99 F. Supp. 962 (W.D. Pa.) and serving in a foreign government (cf. *Elizarraraz* v. *Brownell*, 217 F.2d 829 (C.A. 9)). Appellee's situation is no graver than that of other persons whose conduct may bring them under these other provisions of the 1952 Act.

3. The primary basis for concern about denationalization is the possibility that absence of nationality will result in depriving the individual of the protection of a state. See Weis, *Nationality and Statelessness in International Law*, 55-56, 121-138, 167-172 (1956). But such protection is a right given by the state which cannot be compelled by a citizen who by his own serious voluntary acts chooses the condition of statelessness. See 5 Hackworth, *Digest of International Law*, 541, 542 (1943), 2 Lauterpacht's Oppenheim, *International Law*, 56-57 (7th ed. 1952). Appellee, therefore, has no basis for complaint. He did everything short of becoming a citizen of another country to show that he did not consider himself bound to his obligations as a United States national. Apparently, he traveled to Czechoslovakia and obtained residence there not as a United States national, but as a stateless person (R.

87). He voluntarily elected to act in such a way as to divest himself of his United States nationality without securing another.

Moreover, appellee has been admitted to Czechoslovakia, and there is no indication that Czechoslovakia intends to expel him.[30] His problems of absence of nationality are more apparent than real. He has voluntarily chosen the country in which he is now residing and working, and he has lived and worked there for seven years. At the present time he appears to meet the basic requirements for Czechoslovakian naturalization, should he choose to acquire that nationality.[31] In short, appellee has established a new domicile and there

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[30] The application for a United States passport indicates that appellee's residence permit was valid until October 22, 1959 (R. 87). It is not known whether a new permit has been issued.

Appellee's status in the event there should be an effort to expel him is a matter to be resolved by international law. Should this country decline to admit appellee, Czechoslovakia would have no basis for complaint since that country admitted appellee without a valid passport, and accepted him for residence as a stateless person—facts which put Czechoslovakia on notice at the time of admission that appellee's status as a United States national was, at the very least, open to question.

[31] Act No. 194 of 13 July 1949, Concerning the Acquistion and Loss of Czechoslovak State Citizenship (United Nations Secretariat, Legal Department, *Laws Concerning Nationality*, pp. 116-117 (1954)), provides in part:

Part I. Acquisition of Czechoslovak State Citizenship

* * * * * * * * * * *

Article 3. By grant. (1) The Ministry of the Interior shall grant Czechoslovak State citizenship to applicants who:

(a) Have not committed an offence against the Czechoslovak Republic or its people's democratic regime, and

(b) Have lived in Czechoslovak territory continuously for at least five years, and

(c) On acquiring Czechoslovak State citizenship renounce, unless stateless, their previous national allegiance . . . .

is no reason to infer that his position is any different from, or more troublesome than, that of any other voluntary émigré.

4. Finally, it is pertinent to note that the rigors of absence of nationality which give rise to concern for the status of those who are stateless are in the process of continual mitigation through the adoption of international conventions to protect the rights of individuals without regard to their *de jure* nationality status. See Van Panhuys, *The Role of Nationality in International Law*, 223-227 (1959); United Nations Secretariat, Department of Social Affairs, *A Study of Statelessness* (1949); Robinson, *Convention Relating to the Status of Stateless Persons: Its History and Interpretation* (1955). Statelessness presents problems to be solved by the political branches of the federal government, if they can and desire to do so. These are not problems for the courts to cure by invalidating general Congressional legislation because it can lead in some circumstances to statelessness. The undesirability of that status has not attained the level of a constitutional principle to be imposed on Congress by this Court.

CONCLUSION

If the Court agrees with the government's view, discussed in Point I, *supra*, that the district court was without jurisdiction of this case under Section 360(b) and (c) of the Immigration and Nationality Act of 1952, the judgment below should be reversed and the cause remanded with directions to dismiss the complaint for lack of jurisdiction. If the Court believes that the district court did have jurisdiction of the cause, then, for the reasons set forth in Point II, *supra*, and in our brief in *Kennedy* v. *Mendoza-Martinez*, No.

19, it is respectfully submitted that the judgment below should be reversed and the case remanded to the district court with directions to grant judgment for the appellant.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1961

DEAN RUSK, Secretary of State,
Appellant,

v.

JOSEPH HENRY CORT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLEE

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IN THE

Supreme Court of the United States

October Term, 1961

No. 20

DEAN RUSK, Secretary of State,

Appellant,

v.

JOSEPH HENRY CORT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLEE

Opinion Below

The opinion of the three-judge district court (R. 32-39) is reported at 187 F. Supp. 683.

Jurisdiction

The judgment of the district court, holding Section 349(a)(10) of the Immigration and Nationality Act of 1952, *infra*, pp. 2-3, unconstitutional, declaring that appellee is a citizen of the United States, and enjoining the Secretary of State from denying him a passport on the ground that he is not a citizen, was entered on October 25, 1960 (R. 40-41). Notice of appeal to this Court was filed in the district court on November 1, 1960 (R. 42-44). On February 20, 1961, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 49), 365 U. S. 808.

Questions Presented

1. Whether the district court has jurisdiction of this action for a declaratory judgment of United States nationality, the issuance of a passport and other injunctive relief under Sections 11-305 and 11-306 of the District of Columbia Code, Sections 2201 and 2202 of the Declaratory Judgment Act, and Sections 10 and 12 of the Administrative Procedure Act.

2. Whether Congress has the constitutional power to provide, as it did in Section 349(a)(10) of the Immigration and Nationality Act of 1952, for the expatriation of a native-born citizen on the ground of remaining outside the jurisdiction of the United States for the purpose of evading service in the armed forces of the United States.

3. Whether Section 349(a)(10) violates the Fifth Amendment in authorizing an administrative agency to adjudicate the loss of citizenship as punishment for criminal conduct without giving the accused person his constitutional rights of grand jury indictment, trial by jury, and acquittal in the absence of compliance with standards of criminal justice.

4. Whether Section 349(a)(10) as written and applied violates the Fifth Amendment because of vagueness as to the adjudicating tribunal, the grounds of expatriation and because of an unreasonable statutory presumption.

Statutes Involved

1. Section 349(a)(10) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, provides as follows:

> Sec. 349(a)(10) [66 Stat. 267-268]:
>
> (a) From and after the effective date of this Chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> • • •

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

2. District of Columbia Code, Sections 11-305 and 11-306, read as follows:

11-305. Jurisdiction-Powers of District Courts conferred.

The United States District Court for the District of Columbia, in addition to its jurisdiction as a United States district court, shall continue to have and exercise all the jurisdiction possessed and exercised by it on August 31, 1948.

11-306. General jurisdiction.

Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States.

3. The Declaratory Judgment Act, 28 U. S. C. [illegible] 2201, 2202, reads as follows:

2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any

court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

4. Sections 10 and 12 of the Administrative Procedure Act, 5 U. S. C. §§ 1009, 1011, read in pertinent part as follows:

Section 10. Judicial review.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction * * *.

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review * * *.

* * *

> (e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; * * *.
>
> Construction and Effect
>
> Section 12 * * * No subsequent legislation shall be held to supersede or modify the provision of this chapter except to the extent that such legislation shall do so expressly * * *.

Appellant has printed Section 360 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273-274, and its predecessor, Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171-1172 at pages 3-6 of his brief.

Statement

The appellee is an American citizen by birth and without any other nationality (R. 1, 33). He initiated this action in the District Court for the District of Columbia against the Secretary of State seeking declaratory and injunctive relief overturning the State Department's denial of his application for an American passport on the ground that he had lost his citizenship, under Section 349(a)(10) of the Immigration and Nationality Act of 1952, *supra*, pages 2-3, by remaining outside the United States during a period of national emergency for the purpose of evading or avoiding service in the armed forces of the United States. In his complaint, appellee alleged, *inter alia*, that he had not remained abroad to avoid his military obligation, and that Section 349(a)(10) was unconstitutional (R. 1-6).

Appellee is a physician and research physiologist, residing with his wife and their two infant children, all American

citizens, in Prague, Czechoslovakia, where he is employed at the Institute for Cardiovascular Research (R. 1, 55).

On May 29, 1951, appellee left the United States for the sole purpose of carrying out the terms of a fellowship given by the National Foundation for Infantile Paralysis, Inc., an American corporation, for work to be performed by him at the Department of Experimental Medicine, University of Cambridge, England (R. 2). Prior to his departure, appellee had registered on May 25, 1951, under and prior to the effective date of the Doctor's Draft Act, 64 Stat. 826, 50 App. U. S. C. § 454 *et seq.*, after having been advised by his Draft Board and University Draft Advisor that he could take up the said position (R. 2).

Appellee assumed his duties at the University of Cambridge where he was employed from 1951 to 1953. (*ibid*) Thereafter, from 1953 to 1954, he was employed at the Medical School at the University of Birmingham in England. (Ibid)

On November 28, 1951, and thereafter, the American Embassy in London demanded that appellee surrender his passport and return immediately to the United States (R. 2, 53, 72-74). This demand was made pursuant to Department of State policies which were subsequently embodied in the regulations declared invalid by this Court in *Kent & Briehl* v. *Dulles*, 357 U. S. 116.

On September 14, 1953, a Massachusetts Draft Board ordered appellee to report for induction into the armed forces (R. 2). Appellee did not appear for induction, being of the opinion that the order was not issued in good faith to secure his military services, that his political associations and physical disabilities made him ineligible for military service, and that he was being ordered back to the United States to be served with a Congressional Committee subpoena or otherwise made the subject of governmental sanctions by reason of his political associations (R. 2, 3, 72-74).

The British Home Secretary refused to renew appellee's English residence permit because the United States Government sought his expulsion (R. 3, 55). Thereupon, appellee sought employment in Israel and in India, and he accepted the first formal offer from Czechoslovakia (R. 3, 55).

On December 17, 1954, appellee was indicted by a grand jury in the United States District Court for the District of Massachusetts on the charge of having failed to comply with the order of September 14, 1953 (R. 75). The indictment is now pending (R. 70).

The complaint and the supporting affidavit herein allege that appellee departed from the United States solely for purposes of securing employment and remained abroad solely for that purpose (R. 3, 52). They also allege that he did not depart from or remain outside of the United States for the purpose of evading or avoiding training and service in the military, air or naval forces of the United States (R. 3, 54, 92, 95). This statement is supported by an affidavit of the American Consul in Prague to the effect that:

> "Without evidence to the contrary, the Consular officer has no reason to doubt Dr. Cort's statements made in the attached affidavit which purports to answer the charge that he departed from and remained outside the jurisdiction of the United States for the purpose of evading or avoiding training and service in the armed forces of the United States." (R. 58, 89)

This statement was made by the American Consul in connection with an application for a passport filed by the appellee in Prague in order that he might return to the United States with his wife and children to fulfill his obligations under the Selective Service Laws, and to secure medical treatment for his wife's illness, diagnosed as multiple sclerosis (R. 56-57).

It is the policy of the Department of Justice to accept a delinquent's belated compliance with his obligations under the Selective Service Laws (R. 56). The details of appellee's

efforts in this direction, including meetings between his counsel and representatives of the Department of Justice, Public Health Service and Selective Service Administration are set forth in appellee's affidavit and in the exhibits annexed thereto (R. 50-71).

On October 15, 1959, the Passport Office of the Department of State made an administrative determination, without a hearing, that appellee had expatriated himself under the provisions of Section 349(a)(10) and denied his application for a passport (R. 93). On October 28, 1959, a hearing was held before the State Department's Board of Review on the Loss of Nationality. No evidence was offered by the Department to show that appellee had departed from or remained outside the jurisdiction "for the purpose of evading or avoiding training and service in the military, air or naval forces of the United States", although it subsequently drew that conclusion from correspondence between appellee and others (R. 103-107). On February 10, 1960, the Board affirmed the decision of the Passport Office (R. 100).

This action was, under the regulations, the "final administrative determination" of the State Department, leaving the appellee without further administrative remedy. Appellant accordingly instituted this action "under D. C. Code, sections 11-305 and 11-306; 28 U. S. Code, sections 1331 and 2201; and section 10 of the Administrative Procedure Act, 5 U. S. Code, section 1009" (R. 1). The complaint also requested the convening of a three-judge court under 28 U. S. C. §§ 2282 and 2284 since "one of the purposes of this action is to enjoin the enforcement and execution of certain acts of Congress for repugnance to the Constitution" (R. 1).

Appellant's motion to dismiss on jurisdictional grounds was denied by District Judge Matthews (R. 18). After a three-judge District Court had been convened under 28 U. S. C. 2282 (R. 12), it likewise held that it had jurisdiction, declared § 349(a)(10) unconstitutional, and granted appellee's motion by summary judgment (R. 32-39).

SUMMARY OF ARGUMENT

Introduction

Appellant asks this Court to declare for the first time in its history that a native born American citizen can be deprived of his nationality and rendered stateless as punishment for crime. In addition, the appellant, to prevail, must persuade this Court to change its recent decision in *Trop v. Dulles*, 356 U.S. 86, which held invalid a statutory provision expelling a deserter from the Armed Forces with the identical scope and purpose as the draft evasion provision involved herein.

Appellant also asks this Court to make four further [illegible] constitutional rights of the citizen to [illegible] that a person born in the United States may be [illegible] by an administrative agency's determination of [illegible] that this can be based upon a statutory presumption of guilt instead [illegible] that he can be [illegible] prevented from [illegible] that although born a United States citizen he can be compelled to seek entry as an alien into the United States [illegible] the desirability of an asylum.

Appellant's petition in this case seems to be motivated by statutory misconstruction, legislative history and judicial authority. However, we address ourselves to it first, in the interests of orderly procedure, since appellant has [illegible]

I

The District Judge correctly held that "the complaint is [illegible] which the judicial power extends under the Constitution, and [illegible] authority to hear and determine it has been conferred upon the District

Court by the Declaratory Judgment Act and the Administrative Procedure Act" (R. 35). It held that the language of Section 360 of the Immigration & Nationality Act of 1952 "shows no intention to provide an exclusive remedy, or any remedy" for those not adopting its procedures, and that neither its language or legislative history required a denial of "existing remedies" to such persons (R. 35).

The District of Columbia Code confers a common law and equity jurisdiction upon the District Court. The Declaratory Judgment Act, 2 U. S. C. §§ 2201, 2202, authorizes the District Court to grant declaratory judgments whether or not further relief is sought. Both these statutes were upheld as the basis for a suit against the Secretary of State to enjoin the refusal of a passport on the ground of loss of citizenship. *Perkins* v. *Elg*, 307 U. S. 325.

Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009, grants "any person suffering legal wrong because of any agency action" a right to judicial review "thereof". It authorizes review of "every final agency action for which there is no other adequate remedy in any court". That statute as well as the other two cited have been repeatedly construed by the courts in the District of Columbia to authorize suits of the present type by nonresident claimants. *Frank* v. *Rogers*, 253 F. 2d 889 and other cases cited *infra*, p. 19.

In view of the breadth of the Declaratory Judgment Act, appellant errs in suggesting that Section 503 of the Nationality Act of 1940 was passed for the purpose of giving nonresident citizenship claimants a cause of action which they did not possess (Gov. Br. 131). The Declaratory Judgment Act has never been restricted to residents. See *e.g.*, *Stewart* v. *Dulles*, 248 F. 2d 602; *Bauer* v. *Acheson*, 106 F. Supp 445 (D. C. D. C., 1952).

Section 503 was merely intended to give a right to enter the United States. The Government's spokesman, in two Committee hearings on the bill which became Section 503,

assumed that an action for declaratory judgment existed under the Declaratory Judgment Act. The discussion in the hearings centered about the *pros* and *cons* of right of entry, not the right of suit.

Section 503 was replaced by Section 360 of the Immigration and Nationality Act of 1952 because Section 503 permitted entries which were fraudulent as to the entrant's identity. Hence Section 360 set up an elaborate screening device. That it dealt with entry, not causes of action, is shown conclusively by its explicit limitation to certain categories of citizen claimants. Congress could not have intended that other categories were to be deprived of all remedy. It is doubtful that such an intention could have been constitutionally effectuated.

Further, Section 2 of the Administrative Procedure Act (5 U. S. C. 1011) passed in 1946 provides that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly." Since the 1952 statute contains no such express supersession or modification, appellee's rights under the Administrative Procedure Act remain unaffected. This Court has given great weight to this unusual legislative provision. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48; *Marcello* v. *Bonds*, 349 U. S. 302, 310; *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41; *Bridges* v. *Wixon*, 326 U. S. 135, 154; *Ex parte Endo*, 323 U. S. 283, 300; *Kessler* v. *Strecker*, 307 U. S. 22, 34; *Ng Fung Ho* v. *White*, 259 U. S. 276, 284; *Yakus* v. *United States*, 321 U. S. 414, 444; *Lloyd Sabaudo Società Anonima per Azioni* v. *Elting*, 287 U. S. 329, 334; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 694; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144; *Federal Communications Commission* v. *Schreiber*, 381 U. S. 279, 290.

Appellant's construction of Section 360 so as to deprive the District Courts of jurisdiction would make the section unconstitutional. Judicial review of the constitutionality of legislation cannot be prevented by legislation. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 52. In the instant case the District Court declared unconstitutional Section 349 (a) (10) of the Act. Appellant would avoid this result by (a) withdrawing the general jurisdiction of the District Court to review action taken under the statute, (b) requiring, as a condition of access to any court that appellee seek a certificate of identity, attempt

to litigate his right to the certificate if it is denied and then enter the United States as an alien. These requirements, totally without practical justification, would make litigation burdensome if not impossible and would themselves be void. Certainly, no such intention should be ascribed to the Congress.

II

The Court below correctly held that this Court's decision in *Trop* v. *Dulles*, 356 U. S. 86 compelled the conclusion that Section 349(a)(10) was unconstitutional. In *Trop*, this Court held that Congress did not have the power to punish wartime desertion by loss of citizenship. It declared that §401(g) of the National Act of 1940 (now § 349(a)(8) of the Immigration and Nationality Act of 1952) was a penal law. Four members of the Court concluded that the deprivation of citizenship as a punishment was barred by the Eighth Amendment. One member, Mr. Justice Brennan, concluded that the punishment was unreasonable because of its harshness, the possibility of statelessness, and the availability of alternative means of punishment. The same and additional considerations must lead to the same result in the instant case.

The draft evasion provisions involved here and the desertion provision involved in *Trop* had a common origin and purpose. "Expatriation of the deserter originated in the Act of 1865, 13 Stat. 490, when wholesale desertion and draft law violations seriously threatened the effectiveness of the Union armies." (Mr. Justice Brennan, concurring in *Trop*, at page 107). The Chief Justice's opinion agreed on the similarity of the two sections (*Trop*, 356 U. S. at 93-94); even the Government once regarded their purpose as the same (Gov't Br., *in Perez* v. *Brownell*, 356 U. S. 44).

Now, in the light of *Trop*, appellant seeks to distinguish the draft evasion provision on the ground that it requires departure from the United States. This requirement does not indicate that foreign relations are affected; it was intended, as appellant elsewhere admits, to penalize one immune from other criminal prosecution. Indeed, the 1865 statute punished the draft evader who traveled merely to another district; and the current statute makes no mention of presence in a foreign country.

Appellant's attempt to assimilate this case to that of *Perez* v. *Brownell*, 356 U. S. 44, involving voting in foreign elections, is not supported by the legislative history of Section 349 (a)(10), by the language of the section, or by the reasoning in *Perez*. The draft evasion and desertion provisions appear first in a Civil War statute whose title, content and legislative history relate exclusively to the maintenance of an army. Act of March 3, 1865, 13 Stat. 487, 490, Sec. 21. Our Government's concern for the impressment of naturalized Americans into military service by their former countries resulted in the Expatriation Act of 1868, 15 Stat. 223, not the parent of the statute involved herein. There was no comparable dispute with foreign countries over Americans going abroad to avoid military service in the United States.

The Revised Statutes of 1878, § 1996, 1998, likewise treat draft evaders and deserters together by imposing "penalties and forfeitures". The same provisions appear together in the Act of August 2, 1912, 37 Stat. 356, which amends the Revised Statutes by authorizing the President to remit the loss of citizenship under certain circumstances; this is further proof that punishment was involved.

The draft evasion provision appears next in the 1944 amendment, 58 Stat. 746, to the Nationality Act of 1940, at the Attorney General's suggestion, for the explicit pur-

pose of punishing draft evaders and aiding the war effort. H. Rep. 1229, 78 Cong. 2d Sess., 2-3.

No decision of this Court supports appellant's further claim of an inherent sovereign power to terminate nationality independent of a specific power over foreign relations. That concept is alien to Anglo-American law. Appellant would have the Court, for the first time in its history, deprive an American-born citizen of his citizenship and make him stateless. The significance of citizenship, and the consequences of statelessness, are too fundamental to be shunted off by a reference to "problems to be solved by the political branches of the federal government, if they can and desire to do so" (Gov't Br. p. 55).

III

The adjudication of nationality loss was made by an administrative agency, the Board of Nationality Review of the Department of State. Such an adjudication and penalty contravene due process. The parent statute was held constitutional only because the courts were able to interpolate into the statute the necessity for a trial and conviction upon a charge of desertion as a condition precedent to expatriation. *Huber* v. *Reilly*, 53 Pa. Stat. 112, *Kurtz* v. *Moffitt*, 115 U. S. 487.

This interpolation is not possible here since provision for court-martial adjudication of desertion stands in sharp contrast to the loss here upon a departmental decision. The constitutionality of this device was questioned by the Court in its *obiter dicta* in *Trop*, 356 U. S. 94, Mr. Justice Brennan concurring, 356 U. S. 107-119.

The suggestion of the Government in No. 19 that appellee has available a "de novo trial" (Br. 52) is not sufficient since he has already been deprived of the privileges of citizenship. Further, appellant proposes to deny appellee

any relief by declaratory judgment against the agency that has declared him stateless and not entitled to a passport, and to require him to sue a different government official, against whom he has no complaint, for different relief.

IV

A statute which provides for the adjudication of nationality loss by an unspecified tribunal is unconstitutionally vague. Another similar denial of due process occurs when the tribunal's determination of crime is not based upon specific standards and it is not clear what elements of the offense must be proven and what defenses are available. Further, adjudication is based upon a statutory presumption whose unreasonableness makes it invalid.

ARGUMENT

I

The District Court has jurisdiction under the District of Columbia Code, the Declaratory Judgment Act and the Administrative Procedure Act.

Appellant's consideration of the jurisdictional problem has avoided a discussion of the three statutes recited in the complaint as supporting the jurisdiction of the District Court of the District of Columbia, Sections 11-305, 11-306, Sections 10 and 12 of the Administrative Procedure Act, 5 U. S. C., Sections 1009, 1011, and the Declaratory Judgment Act, 28 U. S. C., Sections 2201, 2202 (R. 1). Indeed, the Administrative Procedure Act is not even mentioned in the appellant's brief.

The Court below held that "the complaint in this case presents a controversy to which the judicial power extends under the Constitution, and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act and the Administrative Procedure Act" (R. 35).

In response to the appellant's argument that the appellee was required to proceed under Section 360(b) and (c) of the Immigration and Nationality Act of 1952, the Court succinctly stated:

> "Section 360 may well be thought to provide an exclusive remedy for a person outside of the United States who has sought and obtained a certificate of identity and who has applied for admission to the United States at a port of entry. But we need not determine that question. The language of the section shows no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures outlined in subsections (b) and (c). Neither does the section indicate that such persons are to be denied existing remedies. The legislative history of the section does not require such a construction. *Cf. Frank* v. *Rogers*, 102 U. S. App. D. C. 367, 253 F. 2d 889; *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709 (D. C. D. C.). Subsections (b) and (c) were designed to regulate, not to require, the use of certificates of identity.
>
> "While the plaintiff might have applied for a certificate of identity for the purpose of following the procedure set forth in Section 360, there is nothing in this case to indicate that he ever did or that such a certificate has been issued to him. Instead, he has chosen to bring this action under the Declaratory Judgment Act for a judgment declaring him to be a United States citizen." (R. 35)

The District of Columbia Code confers common law and equity jurisdiction upon the District Courts. It authorizes a suit against a cabinet officer to enjoin him

from acting unconstitutionally. *Stark* v. *Wickard*, 321 U. S. 288. It has been upheld in a suit against the Secretary of State to enjoin him from refusing the plaintiff a passport on the ground that she had lost her citizenship. *Perkins* v. *Elg*, 307 U. S. 325.

In addition, Section 10(a) of the Administrative Procedure Act, U. S. C. 1009, grants "any person suffering legal wrong because of any agency action" a right to judicial review "thereof". Section 10(c) confers on the District Court explicit and comprehensive authority to review "every final agency action for which there is no other adequate remedy in any court". In this connection, it is evident that the procedure provided by Section 360 of the Immigration and Nationality Act does not provide an "adequate remedy" for the "final agency action" of the Secretary of State. It does not provide review "thereof", to which plaintiff is expressly entitled under Section 10(a) of the Administrative Procedure Act. It provides for no review of the Secretary of State's actions, but only for review of an exclusion order of the Attorney General, which is not involved in this case.

Section 10(b) of the Administrative Procedure Act authorizes judicial review through "any applicable form of legal action (including actions for declaratory judgment or writs of prohibitory or mandatory injunction * * *)". The reviewing court is charged with the duty to "hold unlawful and set aside agency action, findings and conclusions found to be * * * contrary to constitutional right, power, privilege, or immunity" (Sec. 10(e)). This statute clearly confers a right to judicial review of actions of the Secretary of State based on his adverse determinations of citizenship.

Finally, the Declaratory Judgment Act, 28 U. S. C. Secs. 2201 and 2202, authorizes the District Court to grant declaratory judgments, whether or not further relief is sought. This Court has upheld the use of this Act to review

the Secretary of State's denial of a passport on the ground of loss of citizenship—precisely the sort of action brought by plaintiff in this case, *Perkins v. Elg, supra*; similarly, see the unanimous decision of the Court of Appeals in the District of Columbia sitting *en banc* in *Stewart v. Dulles*, 248 F. 2d 602, 604 involving "a native born American citizen, resident since 1950 in London, England".

It thus appears that even prior to the enactment of the Administrative Procedure Act, review of the Secretary of State's determination of loss of citizenship could be secured in the court below on the basis of the District of Columbia Code and the Declaratory Judgment Act. The Administrative Procedure Act added an additional independent right of judicial review for the "final agency action" of any department—including, of course, the Department of State.

None of these authorities distinguishes between plaintiffs physically present in the United States and those who may be abroad but who still have been the subject of final adverse action by a federal agency.[1] The common law rule is, of course, that a party plaintiff may invoke the aid of a court by appearing through his attorneys, so long as the court has jurisdiction over the subject matter of the suit and the person (or property) of the defendant. See 14 Am. Jur., Courts, Secs. 181, 182; *Stewart v. Dulles, supra*. A non-resident alien may have access to federal courts under the above statutes, see 2 Am. Jur., Aliens, Sec. 61; *Far-*

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[1] The Government has elsewhere cited footnote in *Brownell v. Tom We Shung*, 352 U. S. 180 (1956), which states, "We do not suggest, of course, that an alien who has never presented himself at the border of this country may avail himself of the declaratory judgment action by bringing the action from abroad." That case concerned the right of an alien not making any claim of citizenship to secure review of an exclusion order. Such a person is not deprived of any rights until *actually excluded*

[illegible]

Before [illegible] that the courts in the District of Columbia have repeatedly construed the Declaratory Judgment Act and the Administrative Procedure Act as authorizing suits of the present type by persons resident abroad claiming to be [illegible] *Dulles*, 348 U. S. 96, 99; *Boudin v. Dulles*, 103 U. S. App. D. C. 1, 254 F. 2d 70; *Boudin v. Dulles*, 103 U. S. App. D. C. 2, 254 F. 2d 71; *Boudin v. Dulles*, 103 U. S. App. D. C. 3, 254 F. 2d 72; *Boudin v. Dulles*, 103 U. S. App. D. C.

Section 503 of the Nationality Act of 1940, contrary to appellant's contention, was not intended to amend the Declaratory Judgment Act of 1934 by giving a right to sue which had not previously existed. It was intended only to give a right of entry to the United States, and incidentally, to enlarge venue. This is apparent from its language, its legislative history and the adjudicated cases.

We turn first to its language. The section does two things. First, it permits a suit against a government department or agency in the "district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States". This gave a venue right beyond that of the Declaratory Judgment Act of 1934, a suit under which had to be brought in the District of the defendant's residence. 28 U. S. C. 1391(b). Second, it provided for issuance of a certificate of identity which would enable the claimant to enter the United States pending the outcome of his claim—if he chose to come here.

In the Congressional hearings on this subject, the Government spokesman explicitly assumed that an action for a declaratory judgment existed under the Declaratory Judgment Act. (Hearings before the House Committee on Immigration and Naturalization on H. R. 6127 superseded by H. R. 9980, 76th Cong. 1st Sess., pp. 290, 291, 504, 505). The discussion in the hearings centered about the *pros* and *cons* of the right of entry (Hearings, *supra*, 291-294).

The Government is equally in error in its discussion of the circumstances that led to the replacement of Section 503 of the Nationality Act of 1940 by Section 360 of the Immigration and Nationality Act of 1952. The criticism of Section 503 was not that it permitted suits for declaratory judgment, but that it permitted entries which were fraudulent. At issue was the identity of the entrant, not the bona fides of the cause of action. (Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 716, H. R. 2379 and H. R. 2816, 82nd Cong. 1st Sess., pps.

106-110, 443-445; and see Annual Report of the Attorney General for 1956, pp. 111-113; and for 1957, pp. 121-123).

Section 360 provided for the screening of entrants by the tripartite device of applying for a certificate of entry, applying for admission to the country subject to the procedures governing aliens, and final decision by the Attorney General subject to a habeas corpus proceeding.

Further proof that Section 360 deals with entry and not causes of action is shown conclusively by the fact that it is by its terms "applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent."

This limitation is relevant to the matter of entry, not to a right to sue. Congress, due to the problem of identification of certain citizenship claimants, was unwilling to permit the entry of persons unless they were under the age of sixteen and born abroad of United States parents or, being over the age of sixteen, had at some time been physically present in the United States. But surely it was not Congress's intention, while denying them entry under Section 360, to deprive them, in addition, of any right to sue in our courts.

The legislative history of Section 360 supports the argument herein made. Not a single witness, legislator or committee report suggested that the purpose was to prevent a suit for declaratory judgment. Every authoritative voice, including that of the Deputy Attorney General, Peyton Ford, assumed that the only problem was that of entry (Joint Hearings, *supra*, pp. 720-721).

Thus, in discussing Section 503, Mr. Ford stated:

> "However, Section 503 authorizes a person who is outside the United States to come to this country after filing such a suit in order to prosecute it to a conclusion." (Joint Hearings, *supra*, p. 720) and s

"The Department of Justice objects to the enactment of Section 360 unless it is amended to provide for the protection of persons abroad who have more than a frivolous claim to citizenship but *who are unable to obtain a United States passport*." (Joint Hearings, *supra*, p. 721). (Emphasis supplied.)

The Senate subcommittee, reporting the bill, stated:

"In spite of the definite restrictions on the use and application of Section 360 to bona fide cases, the subcommittee finds that the section has been subject to broad interpretation, and that it has been used in a considerable number of cases, *to gain entry* into the United States where no such right existed." S. Rep. No. 1515, 81st Congress, 2nd Sess., p. 777. (Emphasis supplied.)

and the House Committee stated:

"The bill modifies section 360 of the Nationality Act, as amended. While it substantially retains the provisions applicable to the person within the United States who is seeking by court action to have his claim to citizenship determined, it *limits the issuability of certificate of identity* to [in] the case of the individual abroad who seeks such determination. Persons who have been physically present in the United States, or persons born abroad of United States citizen parents, only, may institute the court action specified and seek identity certificates under the provision of the bill * * *.

"*Admission of a person* presenting this certificate of identity shall be upon such terms and conditions as the Attorney General may prescribe to guarantee the departure or deportation of the subject if his claim to citizenship is denied by the court. *His admission, further, is subject to any restrictions deemed necessary by the Attorney General for the protection and security of the United States.*" (Emphasis supplied.) House Report No. 1365, 82nd Cong., 2nd Sess., pp. 87-88.

Moreover, the General Counsel of the Immigration and Naturalization Service, who assisted in the preparation

of the Immigration and Nationality Act of 1952, confirms the view that the purpose of Section 360 was to limit the use of certificates of identity as a means of gaining entry to the United States. In an analysis of a prior version of the present Section 360, which appeared in S. 716, 82nd Cong., the General Counsel stated:

> "This Section [Section 360 of S. 716] is designed to replace Section 503 of the 1940 Act. Section 503 permits individuals who are denied privileges as nationals of the United States to bring a judicial action to test the legality of such a denial in the same courts specified in the draft. However, Section 503 authorizes a person who is outside the United States to come to this country after filing such a suit in order to prosecute it to a conclusion * * *. *The Service believes that, by limiting the availability of this section to persons within the United States, the bill will remove from the law one method of obtaining easy entry into the United States.*" (Emphasis supplied.)

Hence, the statement of the District Court in *Lem Mung Ngan v. Dulles, supra*:

> * * * It is quite obvious that the purpose of modifying the special remedy prescribed by the Nationality Code of 1940 was to limit and circumscribe the right to procure a certificate of identity, because manifestly it was capable of abuse. An action might well be filed with the ulterior motive of securing a certificate of identity, rather than with a bona fide purpose of obtaining an adjudication of citizenship." 122 F. Supp. 709, 712.

Appellant's brief is significantly silent on the subject of the Administrative Procedure Act which is one of the principal bases of the jurisdiction of the court below. In addition to the jurisdictional provisions (*supra*, page 4), Section 12 of that statute, (5 U. S. C., Sec. 1011) passed in 1946, provides that "no subsequent legislation shall

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[5] On file in this Court's library

be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly."

The Act of 1952 is certainly "subsequent legislation" which contains no express supersession or modification of the Administrative Procedure Act. The court below was therefore correct in holding that appellee's rights under the Administrative Procedure Act are unaffected (R. 34, 35).

This Court has given the distinctive legislative provision of Section 12 of the Administrative Procedure Act the full force of its words. See, e.g., *Shaughnessy* v. *Pedreiro*, 349 U. S. 48; *Marcello* v. *Bonds*, 349 U. S. 302, 310; *Brownell* v. *We Shung*, 352 U. S. 180. The significance of Section 12 is illustrated by a comparison of *Heikkila* v. *Barber*, 345 U. S. 229, with *Shaughnessy* v. *Pedreiro*, *supra*. In *Heikkila*, the Administrative Procedure Act was held not to increase an alien's rights under a *prior* immigration law; in *Shaughnessy*, dealing with a substantially similar but *subsequent* statute, the Immigration and Nationality Act of 1952, a contrary result was reached because of Section 12 of the Administrative Procedure Act.

Appellant suggests that the decisions in the District of Columbia may be "contrary to the rulings in several districts" (Br., 38). The cases which he cites in a footnote (Br., 38, note 20) do not support this suggestion. They deal not with the availability of review under the conventional jurisdictional provisions invoked by appellee but only with the availability of the special-privilege review under Section 360.* Since most of the cases were decided by courts outside the District of Columbia, they could not

Sato v. *Dulles*, 183 F. Supp. 300 (D. Hawaii 1958), aff'd per curiam, May 5, 1960 (9th Cir., unreported); *Fusae Yamamoto* v. *Dulles*, 16 F. R. D. 195 (D. Hawaii 1954); and *Irina* v. *Brownell*, 112 F. Supp. 15 (D. D. Tex. 1953), all concerned the question whether a plaintiff denied rights of citizenship before Section 503

concern the present issue, inasmuch as suits under the jurisdictional provisions invoked by appellee can be brought only in the District of Columbia, the official residence of the

was restricted by Section 360 could secure review after the amendment under the special privilege of the earlier provision. In none of these cases were the courts presented with the question of availability of review under the general jurisdictional provisions.

Stupp v. *Dulles*, 258 F. 2d 622 (2d Cir. 1958); *Drake* v. *Dulles*, 158 F. Supp. 413 (E. D. Mich. 1958); and *Ficano* v. *Dulles*, 151 F. Supp. 650 (E. D. N. Y. 1954); *Vasquez* v. *Brownell*, 113 F. Supp. 722 (W. D. Tex. 1953), all concerned the question whether a person who had entered the country on a foreign passport, or through trickery, was a person "within the country" so as to qualify to sue for a declaratory judgment under Section 360(a). These cases, too, were totally unconcerned with the availability of relief by suit in the District of Columbia under other jurisdictional provisions.

Ferretti v. *Dulles*, 246 F. 2d 544 (2d Cir. 1957), held that a plaintiff could not secure judicial review under any provision when he failed to show that there had ever been final agency action denying him a right of citizenship. The Court did not even reach the question of its jurisdiction under Section 360, much less the question of its or any court's competence under general jurisdictional provisions.

Samaniego v. *Brownell*, 212 F. 2d 891 (5th Cir. 1954), was not concerned with a plaintiff's right to secure judicial review, but solely with his right to secure admission to the United States for the purpose of subsequently filing suit. Plaintiff in the instant case does not seek entry, of course, but only to sue from abroad.

Tang Tun v. *Edsell*, 223 U. S. 673 (1912); *United States* v. *Ju Toy*, 198 U. S. 253 (1905); and *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), referred to on page 25 of appellant's brief, drew a distinction between persons being deported from this country and those excluded from entering, but the distinction determined whether such persons were entitled, as a constitutional matter, to a judicial hearing. The cases have no bearing on the question of statutory jurisdiction at issue in this case.

Matsuo v. *Dulles*, 133 F. Supp. 711 (S. D. Cal. 1955), appears to be the only case outside the District of Columbia in which the Court, finding it lacked jurisdiction under Section 360, proceeded to consider the possibility of jurisdiction under the conventional statutes invoked in the present case. It concluded that such an action "could not be maintained in this district (California)" because "the official residence of the Secretary of State is in the District of Columbia."

Secretary of State, *Dulles* v. *Richter*, 246 F. 2d 709 (1957), and *Wong Kay Suey* v. *Brownell*, 227 F. 2d 41 (1955), cert. denied, 350 U. S. 969, in the District of Columbia, also concerned solely the availability of review under the special-privilege provisions, Sections 503 and 360. Both cases found jurisdiction present under those provisions and thus neither discussed the availability of the relief here requested.

Congress cannot reasonably be regarded as intending such a harsh and novel result in the absence of explicit legislation. See *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709, 712 (D. D. C. 1954). In *Puig Jimenez* v. *Glover*, 255 F. 2d 54 (C. A. 1, 1958), the Government also urged that review under Section 360 (b) and (c) was the exclusive remedy to a plaintiff to whom, as in the present case, that proceeding would have been extremely burdensome. The Court, through Chief Judge Magruder, said:

> "The language of the McCarran Act does not require us to impute this absurdity to the Congress of the United States. The Congress must speak with a clear voice before the courts would be justified in putting such an interpretation upon legislation as would have the effect of withdrawing the possibility of judicial review from a claimant to American citizenship which such claimant undoubtedly had the right to pursue under the prior legislation" (255 F. 2d at 57).

A serious constitutional question arises if the statute is construed, as suggested by the Government, to foreclose review. "When the validity of an Act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell*

v. *Benson*, 285 U. S. 22, 62. In our view, the appellant's construction of Section 360 so as to deprive the District Court of jurisdiction would make the section unconstitutional. Congress cannot prevent judicial review of the constitutionality of its enactments by attempting to withdraw the jurisdiction of the courts to review such enactment. See *Marbury* v. *Madison*, 1 Cranch, 137.

In *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 52, where Chief Justice Hughes said:

> "The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

See also *Estep* v. *United States*, 327 U. S. 114, 127 (concurring opinion); *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673, 682.

In the present case, the appellee contends that Section 349(a)(10) of the Immigration and Nationality Act of 1952 is beyond the power of Congress under the Constitution. If that section is vulnerable, Congress could not shield it from attack by withdrawing the general jurisdiction of the District Court to review action under it, by depriving many injured persons of any remedy whatsoever because of the limiting language of Section 360 and by requiring as a condition of access to any court that the appellee attempt to secure a certificate of identity, and if successful, come to the United States in the status of an alien to raise the question. Indeed, a preliminary lawsuit might well be required to secure such a certificate. The Secretary of State has argued that since a certificate is a matter of grace, its denial is not justiciable and some courts have agreed. See *e.g. Wong Fon Haw* v. *Dulles*, 114 F. Supp. 906. But if the certificate

did issue, the entrant, an American citizen by birth, could be held in detention without bond and offered no constitutional guarantee of due process while attempting to vindicate his claim to citizenship. See the treatment accorded an alien in *Shaughnessy* v. *Mezei*, 345 U. S. 205.

The burden thus imposed has no justification whatsoever in terms of expediency in the courts or any other policy of Congress. It would be a burden added for no purpose other than to protect Section 349(a)(10) from the danger of invalidation by making litigation of its validity impossible or extremely difficult. As such, Section 360 itself would plainly be void. In any event, no such purpose should be attributed to the Congress. Section 360 should be construed as Congress intended it, as an aid to persons seeking to litigate their rights as citizens and not as an obstacle to such litigation.

II

Section 349(a)(10) is a penal law not reasonably calculated to aid the war effort and therefore unconstitutional under this Court's decision in *Trop* v. *Dulles*, 356 U. S. 86.

In *Trop* v. *Dulles*, 356 U. S. 86, this Court held that Congress did not have the power to punish wartime desertion by loss of citizenship. The principal opinion was delivered by Chief Justice Warren and joined in by Justices Black, Douglas and Whittaker. A concurring opinion was written by Justice Brennan.

The Chief Justice, speaking for himself and Justices Black and Douglas, first reiterated his position in *Perez* v. *Brownell*, 356 U. S. 44, 62, that it is only the citizen, not the Government, who can terminate citizenship. We adhere

to that principle in the present brief for the reasons given by the Chief Justice. It is not, however, necessary for us to argue that point since, under the reasoning of the majority of this Court in *Trop* v. *Dulles*, *supra*, it must follow that Section 349(a)(10) is unconstitutional.

The same conclusion follows from Mr. Justice Whittaker's Memorandum in *Perez* v. *Brownell* dissenting on the ground that the citizen's act there involved "cannot reasonably be said to be fraught with danger of embroiling our Government in an international dispute or of embarrassing it in the conduct of foreign affairs nor, I believe, can such an act—entirely legal under the law of a foreign state—be reasonably said to constitute an abandonment or any evasion or dilution of allegiance to the United States" (356 U. S. 44, 84, 85).

In *Trop* v. *Dulles*, Section 401(g) of the Nationality Act of 1940 (now § 349(a)(8) of the Immigration and Nationality Act of 1952) was held by this Court to be a penal law (356 U. S. at 97). This was the view taken in the Chief Justice's opinion, *ibid.*, and by Mr. Justice Brennan in his concurring opinion (356 U. S. at 86).

Four members of the Court declared that "use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society." 356 U. S. at 101.

Mr. Justice Brennan, in his concurring opinion, concluded that the punishment was unreasonable and, hence, in violation of the Fifth Amendment because of its harshness, the possible result of statelessness and the availability of alternative means of punishment. After pointing out that the history of Section 401(g) shows that it was a "response to the needs of the military in maintaining discipline in the armed forces, especially during wartime", he said

that "we must yet inquire whether expatriation is a means reasonably calculated to achieve this legitimate end and thereby designed to further the ultimate congressional objective—the successful waging of war" (356 U. S. at 107).

Examining the origins of the statute in the Act of 1865, 13 Stat. 487, 490, and the judicial decisions thereunder, Mr. Justice Brennan concluded that the statute "purposed expatriation of the deserter solely as additional punishment", 356 U. S. at 110, and that "Congress's imposition of expatriation . . . [is] a penal device [not] justified is reason", 356 U. S. at 111. For, said the Justice, while there may be some support for Congress's belief that expatriation might further the war effort "any substantial achievement by this device of Congress's legitimate purposes under the war power seems fairly remote", 356 U. S. at 114. Since "these ends could more fully be achieved by alternative methods not open to these objections" (*ibid.*), Mr. Justice Brennan held that:

> "'the requisite rational relation between this statute and the war power does not appear—for in this relation the statute is not 'really calculated to effect any of the objects entrusted to the government' . . . *McCulloch* v. *Maryland*, 4 Wheat. 316, 423—and therefore that § 401(g) falls beyond the domain of Congress." (*ibid.*)

These being the views of the Court with respect to the desertion provision, the same conclusion must follow with respect to the draft evasion provision in view of the common origin and purpose of the two grounds for loss of citizenship. Both sections had their origin in Section 21 of the Act of March 3, 1865, 13 Stat. 487, 490. As Mr. Justice Brennan pointed out:

> "Expatriation of the deserter originated in the Act of 1865, 13 Stat. 490, when wholesale desertion and draft-law violations seriously threatened the effectiveness of the Union armies." (*Trop* v. *Dulles*, 356 U. S. 86, 107)

The Chief Justice's opinion was in complete agreement on the similarity of the two sections although he suggested an additional constitutional objection to the draft evasion section:

> "Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401(j) of the Nationality Act, decreeing loss of citizenship for evading the draft by remaining outside the United States. This provision was also before the Court in *Perez*, but the majority declined to consider its validity. While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial." (356 U. S. at 93-94)

Indeed, the Solicitor General has elsewhere recognized the common origin and purpose of the draft evasion and desertion provisions (Govt. Br. in *Perez* v. *Brownell*, *supra*, p. 49):

> "For the most part, the history of Section 401(g) is bound up with Section 401(j), which we have just discussed (*supra*, pp. 40-49). Both provisions stem from the same 1865 Act, and they had the same history until 1940. The 1940 Act continued the desertion provision but omitted the draft-evasion portion.
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> "The reasons which sustain Section 401(j) also apply to the cognate Section 401(g). Desertion in wartime, like draft-evasion, is a repudiation of the highest obligation of citizenship, and involves kindred considerations. Subsection (g) does differ from subsection (j) in that it omits the requirement of flight from this country or foreign residence; but the absence of this factor does not swing the balance against constitutionality * * *."

In the companion case of *Kennedy* v. *Mendoza-Martinez*, No. 19, October Term, 1961, the District Court agreed on

the similarity of the draft evasion and desertion provisions and stated that its views on Section 401(j) "are similar to the views entertained by Mr. Justice Brennan on Section 401(g) in his concurring opinion in *Trop* v. *Dulles*." *Kennedy* v. *Mendoza-Martinez*, No. 19 Oct. Term 1961, R. p. 42.

Finally, the Court below concluded that there was "no substantial difference between the constitutional issue in the *Trop* case and the one facing us. The court's ruling there is controlling here" (R. 38-39).

Now, in the light of the *Trop* decision, the Government would repudiate its prior assimilation of the draft evasion to the desertion provisions. It seeks to distinguish them on the ground that expatriation in the present case requires "departing from or remaining outside of the jurisdiction of the United States" (Govt. Br. in No. 19, p. 13). From this, it concludes that the draft evasion provision might be related to foreign relations and that the deprivation of citizenship was not intended as punishment. This argument is not supported by the legislative history of the section, by its language, now or earlier, or by the reasoning of this Court in *Perez* v. *Brownell*, 356 U. S. 44. Further, it is inconsistent with the Government's argument elsewhere that "the requirement of flight from this country or foreign residence" is not the constitutional criterion (*supra*, p. 31).

The draft evasion and desertion provisions appear in the identical section of a Civil War statute significantly entitled "An Act to amend the several Acts heretofore passed to provide for the enrolling and calling out the national forces, and for other purposes" (13 Stat. 487, 490, Section 21). Appellant rewrites history in suggesting that the statute had the unstated purpose of protecting deserters and draft evaders from army service in other countries (Govt. Br. in No. 19, pp. 41, 42). The Act of 1865 contains many other provisions relating to the main-

penalties of an army and none relating to the subject of foreign relations; the marginal titles of the very section involved, Section 21, indicate an intention to *punish* desertion.[4] As the Solicitor General has elsewhere stated, the Act of 1865 was "part of an omnibus military measure."[5]

The Government refers to the fact that "[a]merican history is markedly international difficulties flowing from attempts to compel or prevent military service by young men" (Br. in No. 49, p. 41). These difficulties had nothing to do with the instant problem of American draft evaders. They were the result of the insistence of foreign countries upon the military service of naturalized Americans. This led ultimately to the Expatriation Act of 1868, 15 Stat. 223, and to various treaties between the United States and foreign countries. See, *e.g.*, Treaty With the King of Prussia, February 22, 1868, 15 Stat. 615, T. S. No. 261. The Act of 1865, "an omnibus military measure", *supra*, p. 32, has nothing whatsoever to do with this situation.

In 1912, the 1865 statute was modified to apply only to war-time desertion (Act of August 22, 1912, 37 Stat. 356). The House Report stated explicitly that the Act of 1865 had been passed "as a war measure" (H. Rep. 335, 62d Cong. 2d Sess.) and "imposed the further and most drastic punishment of loss of rights of citizenship."[6]

When Congress came to consider the Cabinet Committee's recommendations of 1938,[7] which ultimately led

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[4] The three significant subtitles are "Penalty for desertion, &c", "Rights as citizens forfeited" and "leaving the country to avoid draft to incur like penalty." 13 Stat. 490, 491.

[5] Supplemental Brief for the Respondents on reargument, p. 14 in *Perez v. Brownell*, *supra*.

[6] It also quoted from the Annual Report of the Secretary of the Navy for the year 1912, who described the statute as "a means of enforcing the draft and of preventing desertion * * * a war measure."

[7] See Hearings before the House Committee on Immigration and Nationality, 76th Congress, 1st Sess. on H. R. 6127, *passim*.

to the passage of the Nationality Act of 1940, it is significant that no recommendation was made for the loss of citizenship by draft evaders (Hearings Before the House Committee on Immigration and Naturalization, 76th Cong. 1st Sess. on H. R. 6127). If, indeed, this was a substantial problem in our foreign relations going back to the Civil War, it is strange that the Secretary of State, who was represented on the Cabinet Committee, made no such suggestion to the Congress.

It was not until we were at war that the draft evasion provision was restored by an amendment to the Nationality Act of 1940 passed on September 27, 1944 (58 Stat. 746). Section 401(j) was passed upon the recommendation, not of the Secretary of State but of the Attorney General of the United States, its chief law enforcement officer, whose duties included the enforcement of the Selective Service Law (H. Rep. 1229, 78th Cong. 2d Sess.). The Attorney General was silent on the subject of foreign relations, discussed violations of the Selective Service and Training Act of 1940 and the desirability of adding loss of citizenship to the other penalties to persons "unworthy of citizenship" (*ibid.*).

On the floor of the House, Rep. Dickstein of the House Committee on Immigration complimented the Federal Bureau of Investigation for its assistance in connection with this statute (90 Cong. Rec. 3261-2). He described "any American who leaves this country for the purpose of not serving in time of war" as "a traitor" (90 Cong. Rec. 3261). Senator Russell, Chairman of the Senate Immigration Committee, said that persons who "were unwilling to serve their country * * * should be penalized in some measure" (90 Cong. Rec. 7629)[8]. Hence the Government was quite correct in describing Section 401(j) to this

[8] Earlier he said, "The Department of Justice is exceedingly anxious that these bills be enacted into law" (90 Cong. Rec. 7628).

Congress of provisions which "reenacted" the Act of 1865. (Brief for respondent, pp. 43, 61 in *Kennedy v. Mendoza-Martinez*, 356 U. S. 920.)

In 1952 the provisions were largely unchanged, with minor changes, into the Immigration and Nationality Act of 1952, without explanatory debate. It added a provision that "failure to comply with any provision of any compulsory service laws shall raise the presumption that the departure or absence was for the purpose of draft evasion." It is fair to say that the purpose of the 1952 statute was identical punitive one underlying the Acts of 1865, 1918 and 1944.

The Government's attempts to assimilate this case to *Perez* are unsuccessful since, in that case, apparently this Court regarded the act of voting as one for possible embarrassment in our foreign relations. Mr. Justice Frankfurter's opinion was that by participating in the electoral processes of the other country the American citizen may "encourage a course of conduct contrary to the interests of his own Government; moreover, the people or government of the foreign country may regard his action to be the action of his Government, or at least as a reflection if not an expression of its policy." (356 U. S. 44, 59). This is, of course, completely inapplicable to the act of "departing or remaining outside of the jurisdiction of the United States" for the purpose of avoiding draft obligations.

The Government argues, however, that because the desertion provisions are based upon departure from the United States, foreign relations might be involved (Br., No. 19, p. 37). This is an argument of forensic ingenuity but is not, however, one based upon the realities of legislative intent or actual danger. That foreign relations is not the reason is shown by the fact that the earlier statute, that of 1865, penalized the draft evader even if he moved into another district, and the current statute refers to departure from the United States rather than to presence in a foreign country. If embarrassment in foreign relations was a concern of Congress, it would have been more rea

sonable to have the statute read "entering into or remaining in any foreign state." Expatriation, as the statute now reads, could result in going beyond the twelve mile limit, or journeying to ungoverned polar regions where no involvement with foreign relations could be claimed.

The effect of harboring violators of the draft laws is no different from that of harboring violators of other laws. Yet no one has suggested that it would be reasonable or constitutional to denationalize tax evaders, bank robbers, narcotic offenders (see concurring opinion of Justice Brennan in *Trop*, 356 U. S. at 113), persons who obstruct the draft (*cf. Schenck* v. *United States*, 249 U. S. 47), or rum runners (*cf. Ford* v. *United States*, 273 U. S. 593). If foreign relations are affected adversely as a result of harboring fugitives from our laws, the nature of the offense is quite irrelevant.

But even if presence in a foreign country had been made the statutory criterion—as explicit as *e.g.*, voting in a foreign election—that would not meet this Court's test in *Perez, supra*. The draft evader who goes abroad is not engaged in "abandonment or any division or diminution of allegiance to the United States" to use the words of Mr. Justice Whittaker's dissenting Memorandum in *Perez*, 356 U. S. at 88. He has not transferred his allegiance any more than the draft evader who remains within the United States, or the tax evader who goes abroad to avoid a prime obligation of citizenship.

The Government, we think, has missed the essence of this Court's three decisions upholding expatriation laws. In each one of these such cases, *Savorgnan* v. *United States*, 338 U. S. 491 *Mackenzie* v. *Hare*, 239 U. S. 299; *Perez* v. *Brownell*, 356 U. S. 44, the person involved had another nationality.[9] The question in each case was whether the

[9] While the petitioner in *Perez* v. *Brownell*, 356 U. S. 46, was a United States citizen by birth, we assume, as does the appellant, Br. No. 19, p. 41, that he was a dual national since neither the opinion nor the briefs raise the issue of statelessness.

act, whether of marriage, oath of allegiance, or voting, indicated a choice of the other nationality, and in the one case, the possible attribution to the United States of an interference in the internal affairs of another nation by the voting of its national. This is clearly not such a case.

In truth, there is nothing in our political history to show that such fugitives—and particularly those who desert or avoid the draft—have impaired our foreign relations. Had that been the case, Congress could have solved the problem by entering into appropriate treaties.

This is the first case in which, if the appellant were upheld, an American citizen would be rendered stateless. Before so radical a step is taken by this Court, we respectfully urge it to consider the entire history of Anglo-American law as to the nature of citizenship and the practical, legal and modal effects of statelessness. It is significant that the British Government has never asserted the right to deprive a British subject by birth of his nationality. Jones, *British Nationality Law*, 167 (rev. ed. 1956). See also, Hall, *Foreign Powers and Jurisdiction of the British Crown*, 44-45 (1894).[10]

But the effect of rendering an American citizen stateless is so drastic that, we submit, it can only be done by a constitutional amendment.

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[10] The state does have wide power in England to revoke naturalization. Jones, *op. cit. supra*, at 167-68. The distinction between native-born and naturalized subjects is quite obvious from the literature. See McNair, *British Nationality and Alien Status in Time of War*, 35 L. Q. Rev. 213, 217 (1919) (referring only to revocation of naturalization); 2 Anson, Law and Custom of the Constitution pt. I at 290-91. This has no bearing upon our problem in view of the equality of treatment required by the Fourteenth Amendment. See *United States v. Wong Kim Ark*, 169 U. S. 649.

First, it would eliminate the individual from any meaningful connection with organized society. "[I]t excommunicates him and makes him, literally, an outcast". Mr. Justice Brennan, in *Trop* v. *Dulles*, 356 U. S. 86, 111. In *Schneiderman* v. *United States*, 320 U. S. 118, 122, the Court said of the loss of citizenship:

> "• • • In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world is the right of citizenship of greater worth to an individual that it is in this country. It would be difficult to exaggerate its value and importance."

Second, it would subject him to the many disabilities of aliens in the United States. *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (deportation policy almost solely within Congressional discretion); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (power to exclude includes power to detain stateless alien indefinitely); *Carlson* v. *Landon*, 342 U. S. 524 (discretionary refusal of attorney general to grant bail not reviewable unless arbitrary).

Third, most seriously, it would permit the monstrous punishment of banishment from one's native soil. "True exile is unknown • • • " in England, said Pollock and Maitland, *History of English Law*, 518 (2nd ed. 1898). Similarly, 1 Blackstone, Commentaries at 137. Is not that equally true in the United States?

Finally, it would destroy his rights in the field of international relations which are dependent upon a protecting nation. Judge Lauterpacht, of the International Court of Justice, took a realistic approach to the concept of citizenship when he wrote that it is "an instrument for securing the rights of the individual in the national and international sphere", rather than "a privilege • • • conferred by the State." Lauterpacht, Foreword to Weis, *Nationality and Statelessness in International Law*, at xi (1956). Such an approach recognizes that "citizenship" is merely a short-

hand expression for the manifold rights which it represents. It also suggests the increasing necessity that every man have a nationality.

The right of every individual to have a nationality was asserted long before statelessness became the serious problem it is today. See *e.g.*, Cicero, *Pro Balbo* II-27-28; *De Domo Sua* 29.77 (Watts transl. 1935); and Salmond, *Citizenship and Allegiance*, 17 L. Q. Rev. 270, 277 (1901). It is reflected in David Dudley Field's early draft of an International Code. Field, *Outlines of an International Code*, 248 (2d ed. 1876). The International Law Association meeting in 1924 urged that "nationality should only be lost as the effect of the acquisition of another nationality."[11] As the problem of statelessness increased, it became the subject of repeated studies and resolutions of international conventions.[12] Recent investigations by the United Nations and others, these past several years have taught us the seriousness of the problems created by hundreds of thousands of refugees without the right to a national residence and a national state to protect them.[13] Consequently, it is increasingly recognized by scholars that, national constitutions aside, a state may not be entirely free to denationalize and that its actions may constitute an *abus de droit*.[14]

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[11] Resolution No. 4, 34th Conf. (1924) in *International Law Ass'n, Transactions*, 1873-1924, at 80 (1925).

[12] See *League of Nations Pub. Nos. C. 224.M.111.1930V*, *C.26.M.15.1931V*; *U.N. Doc. No. E/Conf. 17/5/Rev. 1* (1954); *U. N. Convention Relating to the Status of Refugees*, Geneva, July 28, 1951, *CMD. No.* 9171 (T. S. No. 39 of 1954).

[13] *U.N. Doc. No. A/CN.4/50* (1952); *U.N. Doc. No. E/1112 & E/1112 Add.1* (1949); *U.N. Doc. No. E/Conf./17/5* (1954). See also Simpson, *The Refugee Problem* (1939).

[14] Weis, *Nationality and Statelessness in International Law*, *supra* at 51.

We believe the American constitutional system to be the one least consistent with the principle of involuntary denationalization. The political ideas which most influenced the drafters of the Declaration of Independence and of the federal and early state constitutions [15] were the social-compact theory of Locke,[16] the doctrine of natural rights,[17] and the concept that the people are sovereign under a government of limited powers.[18] These principles were reflected in the state constitutions, the Declaration of Independence, and the Constitution itself. They find support in the provisions of the Bill of Rights and even in the statements of those who argued that a Bill of Rights was unnecessary.[19] The ninth and tenth amendments contain the most explicit statements of the sovereignty of the people ever to appear in a national constitution.

We respectfully submit that a Constitution so conceived cannot be fairly construed so as to authorize a Government of limited powers to deprive a native born citizen of all meaningful status, to render him stateless and to banish him from the country of his birth.

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[15] Becker, *Freedom and Responsibility in the American Way of Life* 13-16, 68-70 (1954); Parrington, *The Colonial Mind* 188-90 (1927); Rossiter, *Seedtime of the Republic* 430 (1953); Wright, *American Interpretations of Natural Law passim* (1931).

[16] Locke, *Second Treatise of Civil Government* § 135 (1690). Compare 1 BLACKSTONE, *Commentaries* * 125, Otis, *The Rights of the British Colonies Asserted and Proved* (2d ed. 1765).

[17] See generally Gierke, *Natural Law and the Theory of Society* (Barker transl. 1934).

[18] Becker, *supra* note 15.

[19] Hofstadter, *The American Political Tradition* (1949).

III

Section 349(a)(10) denies due process of law in that it permits adjudication of loss of citizenship by an administrative agency.

The constitutional defect existing in the draft evasion provision of the statute involved herein, in contrast to the desertion provision involved in *Trop*, is best set forth in the Chief Justice's opinion in that case:

> "* * * While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial." 356 U. S. at 94.

It will be recalled that in the case of a deserter, the Act of 1865 did not in terms provide for the loss of citizenship or "citizenship rights" in the absence of a trial before a court or a court-martial. In *Huber* v. *Reilly*, 53 Pa. State 112, the Court read that provision of the Act of 1865 in conjunction with other statutes so as to require a trial and conviction upon the charge of desertion as a condition precedent to expatriation. It did this upon the basis of constitutional considerations which, in its view, would otherwise have made the statute unconstitutional:

> "* * * But I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offense and the imposition of legal penalties, can be in any other mode than by trial according to the law of the land or due process of law, that is, the law of the particular case, administered by a judicial tribunal authorized to adjudicate upon it." *Id.* at 117.

This construction of the 1865 Act was approved by the Supreme Court in *Kurtz* v. *Moffitt*, 115 U. S. 487. The history of this is set forth in Mr. Justice Brennan's concurring opinion in *Trop* v. *Dulles*, 356 U. S. at pp. 107-19.

If due process requires that a deserter be convicted before he may be denationalized, the same is required in the case of a draft evader. The Government's brief in *Mackey* v. *Mendoza-Martinez* states that "there is no violation of due process" but it fails to comment in this connection upon *Huber* v. *Reilly*, *Kurtz* v. *Moffitt* or upon the opinions of the Chief Justice and Justice Brennan in *Trop*.

Instead, the Government argued in the *Mackey* case that the appellant is entitled to a "de novo trial" (Br. No. 19, p. 31) in which the Government has the burden of proof.[20] This hardly meets the problem since appellee has already been deprived by an administrative agency's decision of his citizenship and of the privileges of citizenship, including the right to a passport. Hence, this formulation in the Government's summary of argument: "Citizenship cannot be forfeited administratively under Section 401(j) *in any final sense*" (Br. No. 19, p. 14). Emphasis supplied.

In *Mackey* v. *Mendoza-Martinez*, the Government seeks to enhance the alien's position by arguing that he "is entitled to bring a declaratory judgment to establish his citizenship" (Brief, p. 31). In the instant case, the Government denies that appellee has an equal right and would have him enter as an alien and subject to all of the problems of such entrance under the Immigration and Nationality Act of 1952. However, regardless of the problem of ultimate remedy, the fact is that a decision made by a government department and not by a court—has stripped appellee of his citizenship and the benefits thereof.

The basic principle of law was stated many years ago by Mr. Justice Brandeis in *Ng Fung Ho* v. *White*, 259 U.S. 276, 284-285:

> "To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in Chin Yow v. United States, 208 U. S. 8, 13. It may

[20] In the instant case, the Government does not concede that appellee is entitled to "a judicial trial *de novo*" (see Br. p. 47).

result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare United States v. Woo Jan, 245 U. S. 552, 556; White v. Chin Fong, 253 U. S. 90, 93."

Appellant's argument that this rule "obviously does not apply here since appellee remains abroad" (Br., p. 9), is not very illuminating. Appellee is not a person seeking entrance into the United States who, the appellant says, was never a citizen. In this case, it is the appellant who has the burden of showing that appellee's citizenship by birth has been lost by certain conduct. Nor are we dealing here with mere property rights. The deprivation involved in the present case is one of citizenship. Its effect is statelessness. If any situation exists in which a judicial determination must precede an adjudication of loss of rights, this is such a case.

IV

Section 349(a)(10), as written and applied, denies due process of law by reason of its vagueness and by its creation of a presumption of unlawful purpose in remaining abroad from "failure to comply with any provision of any compulsory service laws of the United States."

Appellee has been indicted by a grand jury in the District of Massachusetts, on the ground that he had failed to comply with his duties under the Selective Service Law "and the rules and regulations made thereunder" by not reporting for induction (R. 751. There has been no trial as yet under this indictment. Indeed, one of the purposes of this litiga-

tion was to permit appellee to meet the charges either by trial or other disposal of the indictment which would include reporting for induction and other compliance with the Selective Service Laws (R. 76-85). Despite the fact that a jury has never tried the appellee, the appellant has made an adjudication pursuant to Section 349(a)(10) of the 1952 Act that appellee has violated these laws and further that he remained abroad for that purpose. This determination was made by the administrative agency upon the basis of the presumption set forth in Section 349(a)(10) of the 1952 Act (R. 106), reading as follows:

> "For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."

The District Court, without specifying this presumption, upheld this determination (R. 32), stating that "We are convinced that his purpose was to avoid service in the armed forces" (R. 36). The appellee does not believe that, upon the basis of the present record, the court's being "convinced" was the equivalent of the clear and convincing evidence rule established by this Court in *Nishikawa* v. *Dulles*, 356 U. S. 129. The court below, as well as the administrative agency, was relying upon an inference drawn from the fact that the appellee had at one time indicated a desire to return to the United States to resume his teaching of medicine. The court disregarded the appellee's sworn statement, whose credibility was confirmed by the American Consul in Prague, that while the appellee may have remained abroad in the face of a selective service order, his reasons for remaining abroad were very different (54, 89). To the extent that the Government is aided by the presumption in Section 349(a)(10), we submit that the statute is unconstitutional because there is "no rational con-

lection between the fact proved and the ultimate fact presumed."

In *Tot v. United States*, 319 U. S. 463, 467 (1943), this Court held:

> "... a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." ...

The absence of a rational connection is highlighted by three factors: (1) the presumption operates with respect both to departure and absence; (2) it arises upon a failure to comply with "any provision of" "any" compulsory service laws; and (3) it exists despite the burden of proof required by the Constitution.

(1) Assuming the reasonableness of any presumption in the case of so affirmative an act as an unexplained departure, such reasonableness would not follow in the case of one who like the appellee made no change in the *status quo*.

(2) However, the more serious defect, as we see it, lies in the indifference of the statute to the kind of "failure to comply." There are hundreds of obligations as to which there may be a failure to comply, including the most routine cases of failure to indicate a change of local address or the failure to fill out a particular form. Surely, every one of these technical and insignificant violations of law cannot be said to have a rational connection with the ultimate conclusion of remaining abroad for the purpose of avoiding military obligation.

(3) The presumption becomes even more unreasonable in view of the standard of proof constitutionally required in expatriation cases. *Nishikawa v. Dulles*, 356 U. S. 129. In addition, the Government correctly points out that it must show that "the dominant or primary motive in leaving or

remaining away has been to avoid military service.'" * (Br. in No. 19, p. 59.)

There is, however, a more fundamental objection to the statute on the ground of vagueness. First, it nowhere states what tribunal is authorized to decide whether a citizen has lost his nationality by certain criminal conduct. There can be nothing more serious constitutionally than vagueness in the name of the tribunal authorized to make decisions affecting liberty and property.

Secondly, there is vagueness as to what constitutes the offense of departing or remaining away "for the purpose of evading or avoiding training and service"; equally vague is what constitutes a "failure to comply with any provision of any compulsory service laws" which includes of course the Selective service regulations.

We do not think that either the appellant or the District Court was in a position to determine competently on the basis of standards of criminal justice that the law was violated. What were the regulations of the selective service board which were violated? What were the particular acts of the appellee which constituted that violation? Did the appellee have any legitimate reasons for not responding to the order of the selective service board which might have rendered that order or its enforcement invalid? Some of these are suggested by the complaint in this action where the appellee stated his belief "that the induction order was not issued in good faith to secure his military services, that his past political associations and present physical disabilities made him ineligible for such service, and that he was being ordered to report back to the United States to be served with a Congressional committee subpoena or indicted under the Smith Act (54 Stat. 670, 18 U. S. C. § 2385)." (R. 213).

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* Brief in *Mackey* v. *Mendoza-Martinez*, *supra*, p. 39, and administrative and judicial decisions cited pp. 39-41.

In the event of a criminal trial under the indictment, it is, of course, conceivable that appellee may be acquitted either on the basis of the defenses indicated above or for other reasons of a technical or substantive nature. However, under these circumstances, could the determination of loss of nationality made in the instant case remain?

CONCLUSION

This case presents to the Court one of the most fundamental issues in our constitutional system: the relationship between the citizen and his government. Only an affirmance of the judgment below is consistent with this Court's declarations in its earliest decisions that ours is a government of enumerated powers in which the people are sovereign. A contrary decision would change a constitutional system of voluntary transfer of nationality to one of involuntary denationalization and statelessness as punishment for crime. It would disregard the fully argued and considered decisions of this Court made only four Terms ago. We urge that in a period of world history when the individual is increasingly in danger of submergence in the face of state domination, this Court safeguard the rights of our citizens to maintain so fundamental a status, liberty and right as American citizenship.

It is, therefore, respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted.

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September, 1961.

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No. 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

DEAN RUSK, Secretary of State, *Appellant*

v.

JOSEPH HENRY COBB, *Appellee*

BRIEF FOR ANGELIKA SCHNEIDER AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 20

DEAN RUSK, Secretary of State, *Appellant*

v.

JOSEPH HENRY CORT, *Appellee*

BRIEF FOR ANGELIKA SCHNEIDER AS AMICUS CURIAE

INTRODUCTORY STATEMENT

Angelika Schneider as *amicus curiae* presents this brief in support of the following propositions:

1. That a person residing abroad who admittedly at one time was a citizen of the United States may bring a declaratory judgment suit to establish his continued citizenship, and that Sections 360 (b) and (c) of the Immigration and Nationality Act of 1952 do not bar or limit this right.

2. That the authority of Congress to decree expatriation of citizens under the foreign affairs power does not apply to acts such as residence abroad for purposes which do not show either allegiance to an-

other country, or lack of allegiance to the United States.

These propositions are involved in litigation brought by Mrs. Schneider to establish her citizenship and now pending in the United States Court of Appeals for the District of Columbia Circuit. *Schneider v. Rusk*, No. 15,959.

In substance this brief supports the position of the appellee Cort with respect to the availability to him of the remedy of suit for declaratory judgment, which is the same remedy amicus Schneider has sought in her own litigation.

This brief takes no position as to the constitutional validity or invalidity of the statute involved before this Court in the *Cort* case and the *Mendoza-Martinez* case (No. 19), which expatriates those leaving the country to avoid military service. Amicus is not concerned with the issue in those cases in so far as it may hinge upon the war powers of the Congress, nor in the application of the foreign affairs power except to the extent that it may affect her own case. In order to show amicus' interest in the present litigation and its possible effect on her, it is necessary to set forth the facts of her case now pending in the Court of Appeals and the status of that case.

Facts of the Schneider Case

Angelika Schneider (nee Schaffer) was born in Germany in 1934 and was at birth a national of Germany. Before her fifth birthday, she was brought to the United States by her family. She became a United States citizen by derivative naturalization in 1950, through the naturalization of her mother. The decree

of naturalization was issued in the United States District Court for the Southern District of New York.

She lived in the United States continuously from 1939 to 1954—from age five to age twenty. She was educated at grade school at Croton-on-Hudson, New York; in high school at Cornwall-on-Hudson, New York, and Flushing, Queens, New York, and at Smith College in Northampton, Massachusetts, where she was graduated in 1954 with the degree of Bachelor of Arts. Thereafter, she studied at the University of Berne in Switzerland from 1954 to 1955 on a scholarship given by the Institute of International Relations in New York, and in the following year was a full-time student at the Sorbonne in Paris. She returned to the United States in April 1956, took up residence in Nutley, New Jersey and was employed in New York City.

While studying in Paris, she became engaged to Dr. Dieter Schneider, a German citizen and attorney at law practicing at Cologne, Germany. On June 6, 1956, she left the United States to marry Dr. Schneider. They were married in Cologne on July 4, 1956, and Mrs. Schneider has since lived continuously in Cologne with her husband except for one six-week family visit to the United States in 1957 and a one month trip with her husband in 1960.

In Germany there were born to Mrs. Schneider and her husband three children. Each of the first two was at the time of birth, and is now, a citizen of the United States duly registered as such at the United States Consulate. The citizenship of the third, born after Mrs. Schneider's citizenship was revoked and after commencement of Mrs. Schneider's action, is dependent on the outcome of the suit.

Mrs. Schneider feels herself to be an American. She feels no political connection with Germany or its government and has no political loyalty or allegiance to that country. Although she could acquire German citizenship because of her marriage to a German citizen, she has not done so. She desires both to continue to be an American citizen and to remain with her husband and children in Germany where her husband practices his profession.

During all of the time of her residence in Germany until June 1959, Mrs. Schneider was in possession of a valid United States passport. This passport was amended at the times of the births of her first two children to include them. On or about August 21, 1959, the United States Consulate at Duesseldorf, Germany, contending that she had lost her citizenship, deleted from her passport her name and crossed out her picture. The passport was returned to her as valid only in the names of her two sons.

In September 1959, Mrs. Schneider was requested by the American Consulate to surrender her naturalization certificate. She complied with this request under protest, specifically denying the contention that she had forfeited her United States citizenship.

Mrs. Schneider was subsequently served with a "Certificate of Loss of Nationality of the United States" sent to her from the United States Consulate General at Duesseldorf. The accompanying letter stated that the Department of State on September 25, 1959, had determined that she had lost her American citizenship pursuant to Section 352(a)(1) of the Immigration and Nationality Act of 1952 which states that a naturalized citizen of the United States shall lose his citizenship by having a continuous residence

for three years in a foreign state of which he was formerly a national.

Under German law Mrs. Schneider was entitled to remain with her husband so long as she had an American passport. When the passport was taken from her she was subject to expulsion from Germany. She has been able to obtain a temporary residence permit, subject to withdrawal at any time, which permits her to remain with her husband despite her lack of an American passport. Further, in connection with travel (such as her visit to the United States in 1960), she has been required to travel on papers which identify her as a stateless person.

After exhausting her State Department remedies, Mrs. Schneider filed suit in the United States District Court for the District of Columbia. She alleged jurisdiction under the general jurisdictional statute of the District of Columbia, D. C. Code §§ 11-305 and 11-306, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009. She alleged that the statute on which her expatriation was based was invalid because (a) it was without foundation in any power of Congress under the Constitution, (b) it unlawfully discriminated between naturalized and native-born citizens, in violation of the Due Process Clause of the Fifth Amendment, and (c) it imposed cruel and unusual punishment in violation of the Eighth Amendment.

The government moved to dismiss for lack of jurisdiction, advancing the same arguments made in *Cort* here. The District Court denied the motion to dismiss, but granted a subsequent motion for summary judgment on the merits.

Both parties appealed to the Court of Appeals for the District of Columbia Circuit. After briefs and argument, however, that court *sua sponte* announced that it would postpone decision pending decision of this Court in the *Cort* case. Mrs. Schneider then sought certiorari in this Court before judgment by the Court of Appeals. The Government opposition suggested that Mrs. Schneider's interest could be protected adequately by a brief amicus curiae on the jurisdictional point in *Cort*. Certiorari was denied June 19, 1961. As indicated above, this brief discusses not only the jurisdictional point common to Mrs. Schneider's case and *Cort*, but also the constitutional argument on the foreign affairs power to the limited extent that this question is believed to be similar to the questions in the *Cort* and *Mendoza* cases.

ARGUMENT

I. SECTION 360 OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 DOES NOT PRECLUDE A DECLARATORY JUDGMENT SUIT TO ESTABLISH CITIZENSHIP OF PLAINTIFFS NOT RESIDENT IN THE UNITED STATES.

This issue is the same as that presented in the *Cort* case. We understand from counsel that the briefs of appellee Cort and of the *amicus* American Civil Liberties Union will cover many of the arguments made by Mrs. Schneider in the courts below. We shall therefore not repeat those arguments but merely state our agreement

(1) that the provisions of the District of Columbia Code, the Declaratory Judgment Act, and the Administrative Procedure Act mentioned above provide adequate jurisdiction in the District Court to entertain the instant action, and

(2) that the legislative history of Section 360 (b) and (c) shows it was intended to be an additional

remedy for citizenship claimants and not a limitation on the existing remedies.

We believe we can best assist the Court by showing that the practical effect of the Government's contention is to deny any relief and to immunize unconstitutional legislation from review in the courts.

A. The Factual Consequences of the Government Position in Mrs. Schneider's Case

Mrs. Schneider is married to a Germany attorney resident in Cologne. She resides in Germany with her husband and her three infant children in accordance with both her own wishes and her legal duty. For this reason she does not at present desire to live permanently in the United States. She desires to preserve her United States citizenship, because her allegiance is to the United States exclusively and to no other country. Although she has visited the United States for longer periods both before and after this litigation was commenced, she can come only for visits since her husband and infant children reside in Germany where her husband practices. When the Secretary of State deprived her of her passport and issued her a Certificate of Loss of Nationality, she brought suit against him challenging the legality of the statute under which he acted. The Government says she cannot do this, although it is the simple and obvious way of presenting the issue. Instead, according to the Government's view, she must accept imposition on her of an alien's status and enter into concededly "time consuming and financially burdensome" (Brief for Appellant, pp. 38-39) series of procedures consisting in substance of picking an artificial quarrel with the Attorney General who has taken no action against

her. Besides being nonsensically complex the suggestion is practically impossible.

Examination of what it means in practice will show that the supposed exclusive remedy is no remedy at all. The Government says plaintiff must take the following procedures, which are outlined in part in the State Department Rules, 22 C.F.R. § 50.24 et seq.

(i) She must seek from her consular officer and the Secretary of State a certificate of identity to entitle her to come to the United States for purposes of admission. To do this she must establish to his satisfaction not only that her claim is honestly made but also that it has a "substantial basis". § 50.24(c), § 50.31. Under the rules as they exist Mrs. Schneider must be denied a Certificate of Identity because the rules provide (in Section 50.31 defining the meaning of "substantial basis"), "A substantial basis may not be deemed to exist where a Court of the United States has held that the person concerned is not an American national." In the light of the District Court's decision in Mrs. Schneider's case this would seem to preclude the issuance of a certificate even if the Secretary himself were of the opinion that the issue is substantial. If the Secretary were free to waive this rule, there is no assurance or even likelihood that he would do so. It was the Secretary, through his counsel, who, before the District Court's decision on the merits, successfully urged in that court that Mrs. Schneider's case did not present a substantial constitutional question (thus avoiding the appointment of a three judge district court).

(ii) Mrs. Schneider might, of course, seek judicial review of the refusal to issue the certificate. But here she would be blocked again. The Government has in

previous cases successfully contended that the issuance or refusal of a certificate of identity is a discretionary matter and that there is no right to review of such a refusal in the courts. See *Wong Yee Hang v. Dulles*, 144 F. Supp. 906 (S.D.N.Y. 1956). This would be the end of the road; the Government's view of Section 360 would bar all possibility of her securing court review of the withdrawal of her citizenship.

(iii) If by some unforeseen path Mrs. Schneider could secure the certificate of identity, she must then, says the Government, leave her husband and infant children in Germany and seek admission to the United States. She must say that she "desires to proceed to a port of entry and apply for admission to the United States" (§ 50.2) although this is not the fact. Thus, she must abandon her family, in violation of her obligations as wife and mother. Plainly this is something that she cannot do. It is a burden no Congress can be held to have intended.

(iv) If she should in fact go to the United States there would be further obstacles. Assuming no further impossible requirements (such as the making of a statement of intention to remain permanently in the United States, normally demanded on admission), she must go through all administrative proceedings necessary to obtain a final ruling by the Attorney General that he agrees with the Secretary of State that she has lost her citizenship under the statute. During these proceedings, she may be free to remain in theoretical detention, although presumably she would be released on bond. We need not detail how lengthy these proceedings may be, nor the number of procedural pitfalls which may beset her before a final decision.

(v) After these delays she must then sue the Attorney General's representative in a habeas corpus action. During this proceeding and all subsequent appeals she would have to remain in the United States, away from her husband and children, for unless she is in the custody of the Attorney General she has no right to habeas corpus.

Mere consideration of these facts shows that the Section 360 procedure is not only not the appropriate remedy, it is not an available remedy at all. It requires Mrs. Schneider, in order to establish her status as a citizen, to obtain consent to be sued from the Government she wants to sue. It requires her to come to the United States when it is impossible for her to come to the United States at this time. And it imposes other tremendous personal and financial burdens which make the remedy impossible.

This picture of the difficulties in proceeding under Section 360 (b) and (c) is in sharp contrast with the Government's concession in its brief in the *Mendoza* case (pp. 51-52) that a person being deprived of his citizenship is entitled to access to the Courts. Mrs. Schneider received her citizenship by virtue of a U. S. court decree in solemn naturalization proceedings. Yet the Government now claims it can be taken away from her by administrative decision not reviewable in the Courts except under impossible conditions.

We submit that, if Section 360 (b) and (c) is construed as exclusive, it is nothing more than an unconstitutional attempt to prevent Mrs. Schneider from establishing her status by regular process of the courts of the United States. Congress did not intend the section to impose any such burden, and it cannot

properly be so construed. It must be construed as an alternative remedy of assistance to certain litigants, not an obstacle to access to the courts.[1]

B. Miscellaneous Legal Contentions

There are some assertions presented by the Government brief which we are not certain will be treated by the other submissions before this Court. We mention them briefly.

a. The Government says as the admitted premise for its argument regarding the exclusiveness of Section 360 (b) and (c) (Brief for Appellant, p. 24), that *Shaughnessy v. United States*, 198 U.S. 253, and cases following it, establish that even before Section 360 and its predecessor persons abroad could test their citizenship only in exclusion proceedings. The case does not stand for this broad assumption. The court was there concerned with a person actively seeking entry who, on exclusion and detention at the port of entry, sought habeas corpus as the only mode of review open to him. The Court was concerned solely with the constitutional question of the scope of review required in the habeas corpus proceeding. It in no way passed on the statutory question of the availability of other methods of review to citizenship claimants in other circumstances.

[1] The courts of the District of Columbia, as admitted (Brief for Appellee, p. 28), have with one exception repeatedly applied this construction. *Ford v. Peters*, 253 F. 2d 550 (1958); *Guerrieri v. Herter*, 181 F. Supp. 388; *Schneider v. Herter*, decided August 17, 1960 (on appeal to the Court of Appeals); *Leonard v. Dulles*, 137 F. Supp. 939, aff'd 239 F. 2d 60, *cert. denied* 351 U.S. 917. A third judge in that district, in an opinion, *D'Amico v. Dulles*, 113 F. Supp. 933, held otherwise, but was not followed in the later cases.

Subsequent to *Ju Toy* a variety of decisions demonstrate that the mere fact of a plaintiff's presence abroad does not deprive him of access to the U. S. courts. *E.g.*, in *United States* v. *Gay*, 264 U.S. 353 (1924), a person resident in Switzerland was permitted to establish his claim to citizenship by a suit in the Court of Claims. In *Stewart* v. *Dulles*, 248 F.2d 602 (D.C. Cir. 1957), a citizen resident in England sued the Secretary of State to establish his right to a passport. *Perkins* v. *Elg*, 307 U.S. 325 (1939), holding that the conventional jurisdiction provisions permitted a suit to establish citizenship, contained no indication that jurisdiction depended on the plaintiff's presence in this country.[2]

b. The Government, in seeking "a rational basis" (Brief p. 39) for its view that Immigration Service administrative proceedings are desirable and necessary in addition to State Department administrative proceedings as a preliminary to Court action, suggests that the facilities of the Immigration and Naturalization Service are of a superior character (Brief for Appellant; pp. 39-43). It must be pointed out, however, that there is no evidence whatever cited to indicate that the argument as to the assumed superiority of the Immigration Service and its procedures was ever made to, much less accepted by, the Congress which adopted Section 360.[3]

[2] Cf. *Flemming v. Nestor*, 363 U.S. 603 (1960), in which a person residing abroad was permitted to sue under 42 U.S.C. § 405 (g) to assert his claim that deprivation of his social security rights was unconstitutional.

[3] Indeed the suggestion appears to be of rather recent vintage since it was not even mentioned in the briefs below in the *Schneider* case.

II. THE POWER OF CONGRESS TO EXPATRIATE CITIZENS IS LIMITED TO ACTS RATIONALLY CONNOTING LACK OF ALLEGIANCE TO THE UNITED STATES AND ALLEGIANCE TO ANOTHER COUNTRY.

On the merits, the question in which amicus curiae is interested is the extent to which Congress, in the exercise of its foreign affairs power, may provide for the loss of American citizenship.

As indicated above, amicus is not concerned with the questions in *Cort* and *Mendoza Martinez* insofar as justification for the statutes there involved is sought by reference to the war power.

Further, amicus is not concerned with the application of the particular statute involved in *Cort* or in the particular facts of the case. The interest of amicus is limited to the scope this Court may accord to the foreign affairs power as a justification for the withdrawal of citizenship.

A. Mrs. Schneider is being deprived of her rights of citizenship on the basis of Section 352 (a)(1) of the Immigration and Nationality Act of 1952, which provides for the automatic withdrawal of the citizenship of naturalized citizens who reside in the country of their former nationality for a period of three years. The government seeks to justify Section 352 (a)(1), just as it here attempts to justify Section 349 (a)(10) of the Act, as a proper exercise of the foreign affairs power. A consideration of the facts involved in the *Schneider* case will, we feel, assist the court in defining more closely the limits of the authority of Congress under its foreign affairs power to provide for withdrawal of citizenship.

Amicus respectfully submits that any disposition this Court makes of the foreign affairs power argument in the cases pending before it should apply the principle

that the foreign affairs power authorizes Congress to expatriate only for actions rationally deemed to connote lack of allegiance to the United States and allegiance to another country. We suggest this to be the proper construction of the opinion of this Court in *Perez* v. *Brownell*, 356 U.S. 44, as indicated by the language of the Court at page 60:

> "... Moreover the fact is not without significance that Congress has interpreted this conduct [voting in a foreign election], not irrationally, as importing not only something less that complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."[4]

The question whether Congress is dealing with conduct that may be regarded as importing something less than complete and unswerving allegiance to the United States and elements of allegiance to the government of another country is thus concededly significant, and we suggest controlling. If it cannot be said that the act in question rationally may be regarded as indicating allegiance to another country or as at least "compromising" allegiance to the United States it would seem clear that Congress has no power to remove citizenship.[5]

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[4] Cf. the comment of the Chief Justice dissenting. "The citizen may elect to renounce his citizenship and under some circumstances he may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country."

[5] It is perhaps in recognition of the possibility that this position may be accepted that the Government argues (p. 73) that Dr. Cort showed that "he did not consider himself bound to his obligations as a United States national."

An examination of the facts in Mrs. Schneider's case recited above establishes that the mere act of residence abroad is at most a neutral fact not rationally susceptible of construction as importing "less than complete and unswerving allegiance to the United States." Residence abroad in Mrs. Schneider's case "for purposes of marriage and family" is not in any way inconsistent with her allegiance to the government of the United States. Indeed, congressional action itself recognizes this fact, because it has not sought to draw any such inference in the case of born rather than naturalized citizens who marry and live abroad. Also, Mrs. Schneider's conduct, as established by the record in her case, establishes to the contrary an "unswerving allegiance to the United States." She has refused to accept German nationality, which would have been easy for her to obtain, and instead has insisted upon her American citizenship even at the risk of being expelled from Germany as a stateless person and separated from her husband and infant children.[6] The only act committed by Mrs. Schneider is that of residing abroad for the purpose of living together with her family. The legislative power, we think, cannot impose loss of the fundamental right of citizenship on this natural consequence of, and duty resulting from, marriage.

Whatever may be the conclusion which this Court reaches with respect to persons residing abroad for purposes of evading the draft, we ask that the holding of the Court with respect to the foreign-affairs power

[6] She has of course accepted, as forced upon her by her government, the onerous position of a stateless person, and in connection with her visit to the United States while this litigation was pending, has come here on papers describing her as stateless.

of Congress be so limited as not to include within its sweep born or naturalized citizens who, like Mrs. Schneider, reside abroad for purposes fully consistent with their continued allegiance to the United States.

B. There appear indications in the government's brief that independently of the question of allegiance there may be other grounds for the exercise of the congressional foreign affairs power over citizenship.

Thus the government, in its brief in *Mendoza* (p. 41) speaks of the possibility of frictions which may be created between the government of the United States and foreign governments as a result of the presence of draft evaders in a foreign country. We express no opinion on the subject of the nature and extent of the frictions which may arise in such case, or what is appropriately to be done. We wish only to point out that the possibility of "friction" does not automatically create congressional power of an unlimited extent.

Whenever a citizen of the United States travels in a foreign country there is always a possibility that there may be just or unjust complaints about his activities in that country. In this sense there is possible friction in every movement or residence of citizens of the United States (whether born or naturalized) outside the borders of the United States. This does not, however, authorize Congress in its discretion to expatriate all citizens of the United States who wish to travel or reside abroad. This court in *Perez*, in emphasizing the need for a rational nexus between the supposed evil and the remedy, requires the most careful consideration as to whether the kinds of possible frictions which are feared are so great that they may be remedied by no means other than the drastic one of disowning the

citizen and depriving him of that which may make life most precious.

Many lesser remedies are available. We cite a few. Congress is undoubtedly free, when it has good reason to do so, to reduce the measure of protection afforded citizens residing abroad. Such situations occur at present, for example, when the United States withdraws its representative from a foreign nation in which United States citizens are residing. Where the mere presence of United States citizens might be harmful to foreign relations, the government might restrict travel in certain areas. But when travel is permitted, the difficulty of affording protection to a citizen in a foreign country cannot warrant revoking his every political right outside that country—including, indeed, his right to return home. In view of the obvious alternatives, the harsh course provided by Section 352(a)(1) plainly exceeds the power of Congress. Cf. *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

Perez required that "the means—withdrawal of citizenship—must reasonably be related to the end—here the regulation of foreign affairs." Certainly in the case of Mrs. Schneider no such rational nexus exists.

It is suggested that residence of persons abroad for purposes of evading military service will create friction with foreign countries of so great a character as to warrant the extreme remedy of denaturalization. Whether this be so or not, it is clear that mere residence abroad for family reasons does not create such frictions. The only friction that in fact occurred in Mrs. Schneider's case resulted from the removal of United States recognition of Mrs. Schneider's citizenship. It was only then that her peaceful residence abroad was disturbed

by the possibility of her expulsion from her residence with her husband and children because she was declared by her own Government to be stateless.[7]

In the light of the drastic consequences of expatriation, namely statelessness and all it implies, it is clear that Congress must seek some less drastic remedy if it should find that substantial frictions with foreign governments may in certain cases result from residence of citizens abroad. Particularly is this so where the regulation is applied only to naturalized citizens. For a decision upholding Section 352(a)(1) would mark the first substantive exception from the deeply rooted principle that native-born and naturalized citizens are equal in every respect (with the single exception of the constitutional provision limiting the presidency to the natural born citizens). See *Luria* v. *United States*, 231 U.S. 9 (1913); *Osborn* v. *The Bank of the United States*, 22 U.S. 738, 827-828 (1824). The provision, now in Section 352(a)(1), which was originally enacted into law as Section 404 of the Nationality Act of 1940, 54 Stat. 1137, represents the *first* and *only* substantive discrimination between native-born and naturalized citizens in any act of Congress.

Two possibilities need to be excluded as inapplicable in the present case: (1) that real and dangerous frictions may result from the residence abroad of dual nationals, born or naturalized, so that in some cases

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[7] The Draft Convention on the Elimination of the Stateless and on the Reduction of Statelessness, formulated in 1953 by the International Law Commission (U.N. Doc. A/2693, p. 119) states in its Preamble that "... Statelessness is frequently productive of friction between states." As one means of eliminating such friction the Draft provides that residence abroad shall not be a ground for denaturalization.

expatriation may be the only solution, and, (2) that in some cases people may come to the United States only for the purpose of obtaining American citizenship in bad faith, and once having obtained that citizenship leave the country to return to their original home.

Both of these possibilities are inapplicable on the facts of the *Schneider* case, and both are adequately provided for by statute other than 352(a)(1), involved in the *Schneider* case. Mrs. Schneider is not a dual national. She is a citizen only of the United States. And the government has not suggested, and there is no basis for the suggestion, that when in 1930 as a freshman at Smith College, Angelika Schaffer was naturalized by the United States District Court for the Southern District of New York, it was not a good faith naturalization.*

Furthermore, the statutes deal effectively with these two possibilities. Section 350 of the Nationality Act spells out when certain dual nationals lose their American citizenship through residence in the state of their other nationality. Section 340 (d) of the Act deals with bad faith naturalization by a five year rebuttable presumption in case of return to the country of origin.

Plainly the residence abroad of United States citizens is almost as normal as their travel abroad. This is evidenced by the great numbers so involved. Figures maintained by the State Department show that as of March 31, 1959 there were 610,968 United States citizens and their dependents residing abroad, of which 91,833 were government personnel and 519,135 were not employed by or in the government. The largest

* The record shows that she did not meet Dr. Schneider, her husband to be, until several years later.

number of U. S. citizens are in Canada—204,354, of whom almost all are non-government. In Germany, the figures are 28,613 American residents, 15,795 being in government employ. American citizens now reside in 136 countries. The figures are not broken down by the State Department between naturalized and native-born citizens.

The mere numbers of such residents and the fact that the State Department figures do not make any distinction between born and naturalized citizens residing abroad is an indication that residence abroad is not a ground of substantial friction, whether the citizens in question be born or naturalized.

A remedy of statelessness imposed for mere residence abroad for family reasons is unreasonable under the rule of the *Perez* case, and beyond the powers of Congress.

CONCLUSION

For the reasons stated,

1. The decision of the lower court in the *Cort* case, holding that it had jurisdiction, should be affirmed.

2. The decision of this Court on the merits, if based on the Foreign Affairs power, should preserve the principle that foreign affairs power permits expatriation only for actions rationally deemed to connote lack of allegiance to the United States and allegiance to

another country, and in any event not for mere residence abroad, without more.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 29

DEAN RUSK, Secretary of State,

Appellant,

v.

JOSEPH HENRY CORT

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 20

DEAN RUSK, Secretary of State,

Appellant,

v.

JOSEPH HENRY CORT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

This brief *amicus curiae* is submitted with the consent of the parties. Filed with the Clerk of the Court, pursuant to Rule 42 of the Rules of this Court.

Statement of Interest

The American Civil Liberties Union, a national non-profit organization established in 1920, is committed to the inseparable purposes of preserving the democratic principles for which our government was established and to maintaining our civil liberties. Together with all Americans who

prize the blessings of United States citizenship and the privileges of freedom which it brings, it seeks to guard against arbitrary deprivations of citizenship.

The present appeal presents two questions—one substantive, one procedural—but each of far-reaching importance.

The substantive question whether the Congress has the constitutional power to expatriate native-born citizens who have remained outside of the United States during wartime for the purpose of evading service in the armed forces has been examined by the *amicus curiae* in its brief in *Kennedy* v. *Mendoza-Martinez*, No. 19, in connection with the predecessor statute, Section 401(j) of the Nationality Act of 1940. The *amicus curiae* urges the reasons set forth there, without further restatement here, in support of its views that Section 349(a)(10) of the Immigration and Nationality Act is unconstitutional.

The second question, although relating to procedure, poses an issue of even greater significance the accessibility of the courts of the United States to persons who have been expatriated by the determination of administrative agencies. Were the position which the appellant urges upon this Court to prevail, it would severely circumscribe the ability of a citizen to obtain a judicial determination of his claim to citizenship against an adverse ruling of the executive.

The Solicitor General's Brief asks this Court to take a giant step backward—to deny citizenship claimants the benefit of what has become known as the Magna Carta of administrative reform—the Administrative Procedure Act. As the materials in our brief will show, the appellant is attempting to win in this Court a battle which the predecessors of his colleague, the Attorney General, lost in three sessions of Congress between 1948 and 1952, which

they have repeatedly lost in this Court in other cases involving fundamentally the same question, and which has lost the sympathy and support of other officials in the Executive branch.

The President of the United States, while a Representative in Congress from Massachusetts, urged that there be "a less technical and less expensive method of review" of immigration and nationality decisions "to prevent possible capricious action by administrative officials."[1]

Today the Secretary of State, through the Solicitor General of the United States, seeks from this Court a decision which would require a person who claims to be a citizen of the United States to go to jail before he could obtain access to the courts to review the denial of his claim by administrative officials.

Whether there is any legal warrant or historical basis for appellant's position will be examined in this brief. Certainly, as a matter of policy, there can be no justification for extracting detention and confinement as the price which an American citizen must pay in order to "prevent possible capricious action by administrative officials," or, as here, to secure a judicial determination that an Act of Congress is beyond its powers under the Constitution.

Statutes Involved

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009, provides in part as follows:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) RIGHT OF REVIEW.—Any person suffering legal

[1] Hearings Before the President's Commission on Immigration and Naturalization, Statement of Hon. John F. Kennedy, October 2, 1952, p. 322.

wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

Section 12 of the Administrative Procedure Act, 60 Stat. 244, 5 U.S.C. 1011, provides in part:

"No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

The Declaratory Judgment Act, 48 Stat. 955, 28 U.S.C. 2201 provides:

"'In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such."

Rule 57 of the Federal Rules of Civil Procedure provides in part as follows:

"... The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. ..."

Section 360 of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U.S.C. 1503, provides in part as follows:

"(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

"(c) A person who has been issued a certificate of

identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States."

Statement

Appellee was born in the United States in 1927 and lived in this country continuously until 1951. In 1960, while living abroad, he applied for a passport upon which to return to the United States. His application was denied upon a determination that the appellee had lost his citizenship under Section 349(a)10 of the Immigration and Nationality Act of 1952, by remaining outside the United States during a period of national emergency to avoid service in the armed forces of the United States. He filed suit against the Secretary of State in the District Court for the District of Columbia seeking declaratory and injunctive relief. In the complaint he alleged that he had not remained abroad to evade his military obligation and that Section 349(a)10 was unconstitutional. The Secretary of State, by motion to dismiss, and in his answer, asserted *inter alia* that the District Court was without jurisdiction to entertain the declaratory judgment action because Section 360(b) and (c) of the Immigration and Nationality Act of 1952 provided

the exclusive remedy for one residing abroad who claimed a denial of citizenship rights, and also that Section 349(a)(10) was constitutional.

Both parties moved for summary judgment before a three-judge District Court convened under 28 U.S.C. 2282, 2284. The court granted appellee's motion, holding (1) that the government had shown by clear, convincing, and unequivocal evidence that appellee had remained abroad to evade his military obligation; (2) that the court had jurisdiction of the declaratory judgment action; and (3) that Section 349(a)(10) was unconstitutional. This appeal followed.

Summary of Argument

The decisions of this and other courts have established that persons outside of the United States may assert their claims to citizenship in the courts of the United States notwithstanding their nonresidence, as well as a corollary right of nonresident citizens to maintain an action to compel the issuance of a passport.

The Solicitor General would carve an exception into the jurisdiction over these cases in the courts of the United States. He urges this Court to adopt the doctrine that a native-born citizen of the United States, who has been expatriated by an administrative decision of the Secretary of State while exercising his constitutional right to travel abroad, may obtain judicial review of the Secretary's action only at the pain of returning to the United States as an alien, "stopped at the limit of our jurisdiction", submitting himself to detention in the custody of another administrative officer, the Attorney General, and thereafter seeking a determination in an action for habeas corpus of the legality of his detention by that officer.

The doctrine which the Solicitor General urges is egregiously wrong. The legislative history of the Immigration

and Nationality Act of 1952 reveals that the Department of Justice sought legislation from Congress which would confine citizenship claimants to a remedy of habeas corpus but that Congress expressly rejected the request, and reaffirmed the applicability to that Act of the provisions of the Administrative Procedure Act.

Section 360 of the Immigration and Nationality Act, *supra*, which appellant says was intended by Congress to limit a citizenship claimant's judicial remedies, was intended merely to afford certain claimants to citizenship with the opportunity to present themselves physically at a point of entry to the United States and to preclude that opportunity to others. Its purpose was to cut off the opportunity which *aliens* had abused under Section 503 of the Nationality Act of 1940, *supra*, to make fraudulent entry into the United States to prosecute spurious citizenship claims.

Nowhere in the extensive pages of the legislative history of this provision is there any suggestion that Section 360 was intended to restrict the right of a citizen of the United States to obtain the judicial redress, which has been safeguarded to him by the Administrative Procedure Act, of a denial of his citizenship by the Secretary of State.

Moreover, the position of the Solicitor General, if adopted by this Court, would paralyze a citizen of the United States, who is exercising his constitutional right to travel abroad, in seeking the guaranty of the due process afforded by the Constitution while it would immunize the Secretary of State from judicial review of his acts of expatriation.

Congress did not require this in the Immigration and Nationality Act. It sought to prevent it in the Administrative Procedure Act. The Constitution forbids it in the Fifth Amendment.

I. This Court Has Laid to Rest the Proposition That Habeas Corpus Is the Sole Judicial Remedy for Reviewing Administrative Decisions Under the Immigration and Nationality Act.

It is not without significance that the appellant's fundamental position—that a citizenship claimant or an alien is restricted to habeas corpus as his remedy for challenging an administrative decision—has been urged repeatedly in this Court and in various lower courts, and that, at least since the enactment of the Immigration and Nationality Act of 1952, it has been uniformly rejected.

Shaughnessy v. *Pedreiro*, 349 U.S. 49 (1955) disposed of the contention that habeas corpus is the exclusive remedy for deportable aliens. *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956) rejected the claim that it is the exclusive remedy for excludable aliens. *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), prior to the 1952 statute, and *Rassmussen* v. *Brownell*, 256 U.S. 806 (1955) subsequent to that Act, refused to confine determinations of eligibility to citizenship to habeas corpus proceedings.

Long before, this Court had held in *Perkins* v. *Elg*., 307 U.S. 25 (1938) that the Declaratory Judgment Act is available to declare the rights of persons whose claim to citizenship has been denied by the Secretary of State. More recently, the District of Columbia Circuit, in a decision which the then Attorney General did not seek to bring to this Court for review, held that subsection (a) of the identical Section 360 of the Immigration and Nationality Act, 8 U.S.C. 1503, which the appellant here says provides the appellee's sole judicial remedy, is not exclusive, and that Section 10 of the Administrative Procedure Act permits an additional action for a declaratory judgment to determine a citizenship claim. *Frank* v. *Rogers*, 102 App D.C. 367, 253 F. 2d 889 (1958).

These decisions are all distinguishable, of course, from the precise jurisdictional issue raised below. What is important here, however, is that the arguments to sustain the present appellant's position are the identical arguments made and rejected in the cases cited.

It should suffice, without more, to say that if a deportable alien, if an excluded alien, if an alien who seeks merely to establish that he is eligible to become a citizen—if all of these persons have the right of judicial review under the Administrative Procedure Act and may obtain access to the courts of the United States in declaratory judgment proceedings, without the necessity of subjecting themselves to confinement in order to obtain a review of the legality of their detention in habeas corpus proceedings, no less can be permitted to a person like the appellee, who is a native-born citizen of the United States and who has been expatriated by an administrative decision of the Department of State.

The narrow issue here is whether Congress has expressed its intent to exempt from Section 10 of the Administrative Procedure Act the decisions of the Secretary of State which deny citizenship and its rights to persons who are outside of the United States.

Appellant says that Congress has made it "convincingly clear" (Br. 45) that a person outside of the United States who has been denied his claim to citizenship by the Secretary of State has as his sole judicial remedy an application for a writ of habeas corpus, to be maintained at a port of entry to the United States, against the Attorney General or his agents.

In this brief we shall show that the intent of Congress as to judicial determinations of citizenship, whether by persons in the United States or abroad, was no different than it was for the judicial review of deportation and exclusion orders, and that judicial review by way of declaratory judgment

relief is available for the administrative acts of the Secretary of State in nationality decisions.

II. Legislative History of the Judicial Review Provisions in the Immigration and Nationality Act of 1952

(A) *Before the Codification of 1952:*

The history begins in the 80th Congress with two bills, H.R. 6652 and S. 2755, each of them requested by the Department of Justice. See Respondent's Brief, *Wong Yang Sung* v. *McGrath*, No. 161 in this Court, October Term 1949, p. 38.

H.R. 6652 sought to amend Section 2(a) of the Administrative Procedure Act, 60 Stat. 237-38, 5 U.S.C. 1001, by adding "functions or proceedings authorized or required pursuant to the immigration or nationality laws" to the express exclusions from the Act. The House Judiciary Committee, in reporting the bill favorably, declared that the "sole objective of this bill is to exempt the immigration and nationality laws from the provisions of the Administrative Procedure Act of June 11, 1946, except as to Section 3 thereof." The Committee explained "it is necessary to provide expressly for an exemption from the Administrative Procedure Act because of the provisions found in Section 12 of that Act . . ." H. Rep. 2140, 80th Cong. 2nd Sess., p. 1. No action was taken by the House on the bill.

S. 2755, as originally introduced, had the same purpose. The Senate Judiciary Committee, however, reported the "judgment of the Committee that the functions or proceedings authorized or required pursuant to the immigration or nationality laws to the extent they are held to be within the purview of the Administrative Procedure Act[2] should

[2] The District Court for the District of Columbia had recently held in *Eisler* v. *Clark*, 77 F. Supp. 610 (1948), that the Administrative Procedure Act embraced deportation proceedings.

not at this time be excluded from the operation of the Administrative Procedure Act." S. Rep. 1588, 80th Cong., 2nd Sess. The Committee therefore amended the bill to eliminate the provisions that immigration and nationality decisions be excluded from the Administrative Procedure Act, *ibid.* No action was taken by the Senate.

The efforts to exempt the immigration and nationality laws from the operation of the Administrative Procedure Act were resumed in the 81st Congress with H.R. 10. There the exclusionary clause was more fully developed, embracing as well, the Declaratory Judgment Act and Section 503 of the Nationality Act of 1940. Section 5 provided:

> "Nothing in the provisions of sections 5, 7, 8 and 10 of the Administrative Procedure Act (60 Stat. 239, 241, 242, 243; 5 U.S.C. 1004, 1007, 1009), or the Declaratory Judgment Act of 1934, as amended (48 Stat. 955; 28 U.S.C. 400), shall be applicable to the provisions of this Act or to any law relating to the immigration, exclusion, expulsion, or registration of aliens or to the nationality or naturalization laws of the United States; nor shall the provisions of section 503 of the Nationality Act of 1940 (54 Stat. 1171-1172; 8 U.S.C. 903) be applicable in any case which involves a determination of the right of a person to be admitted to or to remain in the United States under the provisions of any of the immediately described laws."

H.R. 10, including the foregoing Section 5, was adopted by the House of Representatives. 96 Cong. Rec. 10468.

In the Senate, H.R. 10 was considered by the Senate Judiciary Committee together with other measures relating to aliens, internal security and passport controls. S. Rep. 2369, 81st Cong. 2d Sess., p. 3. Pertinent here is the fact that the Senate Judiciary Committee disapproved Section

5 of H.R. 10, S. Rep. 2230, 81st Cong. 2d Sess., but approved S. 1832, which at Section 6, provided that judicial review of decisions relating to *expulsion and exclusion of aliens* shall be limited to habeas corpus proceedings. S. Rep. 2230, 81st Cong. 2nd Sess.

However, even this limitation upon judicial remedies was abandoned by Congress, for in the omnibus bill which consolidated H.R. 10 and S. 1832, together with other measures into H.R. 9490, enacted into law as the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 781, both Section 6 of S. 1832 and Section 5 of H.R. 10 were dropped. S. Rep. 2369, *supra*.

The Department of Justice and the Immigration and Naturalization Service thereafter renewed their efforts to secure exemption of immigration and nationality decisions in the bills which were to become the Immigration and Nationality Act of 1952.

(B) *Legislative History of Immigration and Nationality Act of 1952*

The Act of 1952 itself began with S. 3455, 81st Cong. 2d Sess., an omnibus revision and codification of the prior immigration and nationality statutes. This bill, prepared with the assistance of "experts from the Immigration and Naturalization Service, the Visa Division . . . and the Passport Division of the Department of State" (S. Rep. 1137, 82nd Cong. 2d Sess., p. 2) expressly limited judicial review of *all* administrative decisions under its provisions to habeas corpus.[3]

[3] Section 106 of S.3455 provided:

SEC. 106. Notwithstanding the provisions of any other law—

(a) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

(b) determinations of law by administrative officers under the pro-

The provisions of this bill were subjected to "detailed analysis and comment" by the interested government agencies. *ibid.*

Section 106 was said in the analysis made by the Immigration and Naturalization Service to provide that—

> ". . . notwithstanding the provisions of any other law, no court shall review determinations of fact by administrative officers under this Act; no court shall review, except by habeas corpus, determinations of law by administrative officers under this Act, and that no court shall review the exercise of discretionary authority conferred upon administrative officers by this Act.
>
> "The provisions of this section appear to be self explanatory and the Service recommends their enactment. The only suggestion which is offered is that the text of the section be redesignated as subsection (a), with appropriate changes of present clauses (a), (b), and (c) to (1), (2), and (3), respectively; and that there be added a new subsection (b) to read as follows:
>
> "'(b) Nothing in subsection (a) of this section shall be held to apply to court proceedings instituted under section 359 of this Act'.
>
> "This change is suggested because section 359 of the bill authorizes the institution of court proceedings for declaratory judgments in nationality cases and in such proceedings it is obviously contemplated that

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visions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

(c) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court.

> determinations of fact by administrative officers will be subject to court review. Likewise, section 359 itself contemplates a court review of determinations of law by a method other than habeas corpus. Whether or not the specific suggestions for amendment of this section which are here made and the specific suggestions for changes we make in discussing section 359 of the bill are adopted, it appears that the attention of the Congress should be drawn to the apparent conflict between sections 106 and 359 of this bill as they are now drafted. . . ." Analysis, S. 3455, General Counsel, I. & N. Service, Legislative History, Immigration and Nationality Act, 1951, Vol. 1, JK 1061, A-3513-Dept. of Justice.

The bill was revised and reintroduced in the Senate as S. 716, 82nd Cong. 1st Sess. and in the House as H.R. 2379, 82nd Cong. 1st Sess. Those bills modified the original Section 106, *inter alia*, by the addition of subsection (b) which provided:

> ". . . Nothing contained in subsection (a) of this section shall be held to apply to court proceedings instituted under section 360 of this Act."[4]

Hearings were thereafter held on S. 716, H.R. 2379, as well as on an utterly dissimilar bill, H.R. 2816, 82nd Cong. 1st Sess. introduced by Congressman Celler.

Objections were made by diverse legal, social service, religious, and citizenship organizations to the effect of Sec-

[4] That section, as then written, permitted the bringing of an action for judgment to declare a person to be a national of the United States if the claimant is "within the United States". S. 716, H.R. 2379, *supra*. No provision was made there for actions by persons outside the United States or for the admission of such persons to the United States in order to prosecute their claims to citizenship. See *infra*.

tion 106 in exempting deportation, exclusion, and citizenship determinations from the provisions of the Administrative Procedure Act and to the elimination of the opportunity of citizenship claimants abroad to be admitted to the United States to maintain actions for judicial review. Hearings before the Subcommittees of the Committees on the Judiciary, on S. 716, H.R. 2379, and H.R. 2816, (referred to hereafter as Joint Hearings).[5]

Typical of the criticism was the statement of the American Bar Association:

> "We believe that determinations of immigration and naturalization matters as well as citizenship matters should be subject to judicial review provided by Section 10 of the Administrative Procedure Act."

Significantly, both the Immigration and Naturalization Service and the Department of Justice urged retention of Section 106 because it "undertakes to state what has been the traditional provision for judicial review, i.e. habeas corpus." *ibid*, pp. 711-712. See also Analysis of S. 716, General Counsel, Immigration and Naturalization Service, Section 106.[6]

The result in Congress was a victory for the proponents of judicial review under the Administrative Procedure Act.

Further refinements of the immigration and nationality proposals were introduced in the Senate by Senator McCarran as S. 2055, 82nd Cong. 1st Sess. and in the House by Representative Walter as H.R. 5678. The previous Section 106 was deleted from each of these bills.

This modification was not unnoticed by the Immigration

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[5] 82nd Cong. 1st Sess. pp. 106-108, 144, 345-351, 417, 421, 446-450, 528, 536-537, 590-591, 617-618, 671-673.

[6] Their views regarding Section 360 are discussed below under the legislative history of that section.

and Naturalization Service. In its analysis of H.R. 5678, comparable to its prior analyses of S. 3455 and S. 716, it stated:

> ". . . This bill differs from the predecessor bills H.R. 2379 and S. 716, upon which reports were previously made to the Department, in that it fails to carry forward the Section 106 which appeared in those bills. In its report to the Chairman of the Senate Committee on the Judiciary of May 14, 1951, the Department commented upon Section 106 and generally expressed its approval of the provisions thereof. The Department pointed out that the main effect of Section 106 is to spell out for the first time the power of judicial review of the administrative processes.
>
> "It was observed that the provisions of Section 106 taken with Sections 236 and 242, expressed in statutory terms the procedure that was developed over a course of many years in the administration of laws and the judicial review of such administration. *It was further observed that Section 106 undertakes to state that habeas corpus shall be the procedure for obtaining judicial review of administrative decisions in accordance with the traditional development of the field of administrative law. As stated in that report, Section 106 would have obviated review of administrative decisions under this bill by use of Section 10 of the Administrative Procedure Act.*
>
> "*By its elimination, the authors of this bill have necessarily caused the situation to continue whereby decisions of the Service can be reviewed not only by habeas corpus, but also under Section 10 of the Administrative Procedure Act, the basic Federal Declaratory Judgment Act, and also the declaratory judgment action which is provided for in Section 360 of the bill.*

> The continued availability of so many forms of review, which are not necessarily mutually exclusive, adds tremendously to the delays which surround the effective administration of the immigration laws, particularly the provisions thereof which relate to the deportation of aliens from the United States. The problem is well known to the Department and needs no restatement. In the light of all of the existing circumstances and existing facts, the Service recommends that Section 106 of H.R. 2379 be included in the instant bill."
>
> Legislative History, Immigration and Nationality Act, 1951-1952, Vol. 2, JK-1001, .A-3515, Department of Justice. (Emphasis supplied).

Thus, in clear, explicit, and unmistakable language, one of the agencies which was relied upon by Congress for its expertise (S.Rep. 1137, *supra*, p. 2; H.Rep. 1365, 82nd Cong. 2d Sess., pp. 27-28) utterly demolishes appellant's position here that Section 360 is the sole and exclusive judicial remedy for a citizenship claimant abroad.[7]

The congressional sponsors of the immigration legislation did not accede to the Service's request that Section 106 be restored to the bill. (See S. 2550, 82nd Cong. 2d Sess., the final Senate version, and H.R. 5678, the final version as enacted by Congress under Public Law 414, 82nd Cong.) But, significantly for present purposes, they agreed with the evaluation of the effect of the bill upon judicial

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[7] This contemporaneous construction of the Immigration and Nationality Act by the Immigration and Naturalization Service, the amicus curiae here cannot refrain from saying, compels pause at the cynicism with which the Service and the Department of Justice have pressed their contentions in this Court previously and here that the 1952 Act was intended to make habeas corpus the sole remedy for review of administrative determinations. Cf. Briefs of the Solicitor General, *Brownell* v. *Rubinstein*, No. 300, October Term, 1953; *Shaughnessy* v. *Pedreiro*, No. 374, October Term, 1954; *Brownell* v. *Shung*, No. 43, October Term, 1956.

review which the Immigration and Naturalization Service had made.

House Rep. 1365, *supra*, p. 28, states that the bill:

> "Safeguards judicial review and provides for fair administrative practice and procedure (Secs. 235, 242 and 360)."

At the inception of the debate in the House on H.R. 5678, Representative Walter answered a charge that the bill would emasculate judicial review, as follows (98 Cong. Rec. 4302):

> "The Administrative Procedure Act—do you remember the old Walter-Logan bill, which was subsequently enacted into law as the Administrative Procedure Act? Why, this question of unbridled authority in one person is almost an obsession with me. I am the last person in the world who would do anything to destroy the philosophy underlying that type of review."

And again, although directed to the issue of the administrative finality of deportation and exclusion orders:

> "Now we come to this question of finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. *Section 10 of the Administrative Procedure Act is applicable.*" 98 Cong. Rec. 4416.

In the Senate debates, Senator McCarran insisted that it was intended to continue the application of the Administrative Procedure Act except for the special provisions

in respect of the conduct of exclusion and deportation proceedings by special inquiry officers. On May 21, 1952, Senator McCarran observed:

> "*Except for the failure to comply strictly with the dual examiner provisions of the Administrative Procedure Act*, I believe that the procedures set forth are in substantial compliance with the procedural rationale of the Administrative Procedure Act." 98 Cong. Rec. 5626

* * * * * *

> "Let me stress this point, Mr. President: My consistent effort has always been to avoid or eliminate any and all blanket exemptions from the Administrative Procedure Act." *Ibid.*

On the following day he stated:

> ". . . the Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now." 98 Cong. Rec. 5778

The report of the House conferees, appointed to resolve the differences between the Senate and the House on the immigration bill, sets forth the final statement of the congressional understanding of the effect of the bill upon judicial review of the administrative decisions. H. Rep. 2096, 82nd Cong. 2d Sess. p. 127. It states:

> ". . . Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. . . ."

This summary of activity by the Department of Justice thus reveals a continuing effort since 1948 on the part of the Immigration and Naturalization Service and the Department of Justice to exempt both immigration and nationality decisions from the operation of the Administrative Procedure Act. Each attempt, as we have seen, was rebuffed by Congress.

Not content with its failure to secure the exemption by congressional action, the Department of Justice sought to obtain it in this Court for deportation and exclusion orders. The result here is set forth in *Pedreiro, supra*, and *Tom We Shung, supra*.

In sum, when the legislative history of the Immigration and Nationality Act is coupled with the express requirement of Section 12 of the Administrative Procedure Act that

> "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly": 5 U.S.C. 1011.

and the legislative and judicial principle that the Administrative Procedure Act is to be given a "hospitable" construction to accomplish its purpose to "remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act" (*Shaughnessy* v. *Pedreiro, supra*, 51), it seems beyond further question that the District Court below has jurisdiction over an action by a person, even if beyond the territory of the United States, who complains that he has suffered a legal wrong because of the action of the Secretary of State in denying him recognition as a citizen and in refusing to issue him a passport.

III. The Legislative History of Section 360 of the Immigration and Nationality Act

In his treatment of the procedures set forth in Section 360, the appellant maintains conspicuous silence regarding their relation to the provisions of the Administrative Procedure Act. Cf. Opinion below which expressly based the jurisdiction of the District Court upon that Act and upon the Declaratory Judgment Act (R. 35).

The burden of his argument is that Section 360 "establishes special procedures for determining claims to American citizenship" (Br. 23), although he makes no claim, and properly so, that the judicial remedy provided there is a "special statutory proceeding" contemplated by Section 10(b) of the Administrative Procedure Act, 5 U.S.C. 1009 (b). (See *infra*)

His position briefly is that but for Section 360 of the 1952 Act and its antecedent provision in Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C. 903, only the constitutional right of habeas corpus is available for a citizenship claimant who is outside the United States;[8] and that by the provisions which Congress adopted in Sections 360(a), (b), and (c), it has "limited the declaratory remedy to citizenship claimants 'within the United States'." (Br. 24).

(A) *Before the Nationality Act of 1940*

The decisional law upon which the appellant relies for his view that habeas corpus was an exclusive remedy before the Nationality Act of 1940, may be put to the side,

[8] This is to say that such a claimant who is not in the custody of United States authorities at a port of entry has no redress of an administrative denial of his citizenship. Appellants' position assumes, without discussion, what has been shown to be erroneous, that the Administrative Procedure Act is not available to afford judicial relief.

if for no other reason than that the Administrative Procedure Act and the Declaratory Judgment Act erase whatever limitations may be said to derive from the earlier holdings of this Court. See Senate Doc. 248, 79th Cong. 2nd Sess., 212, setting forth the legislative history of the Administrative Procedure Act. But even for the purpose of ascertaining the understanding of Congress, whether in 1940 or in 1952, regarding the judicial review of citizenship determinations, the appellant's statement of the purport of the cases he cites is erroneous.[9]

None of them held that habeas corpus is the exclusive judicial remedy for citizenship claimants outside of the United States. The issue in each of the decisions was not the form of remedy but rather was the scope of the review. While it is true that each of the cases was a proceeding for a writ of habeas corpus, this was so because each claimant to citizenship was, at the time he initiated his action, held in detention by immigration authorities who refused to honor his claim. As *Chin Yow* v. *United States*, *supra*, 208 U.S. at 12, explains: "Habeas Corpus is the usual remedy for unlawful imprisonment."

Nor does the "governing principle" which appellant cites from *Ju Toy* that "due process of law does not require a judicial trial" for a citizenship claimant who has been "stopped at the limit of our jurisdiction" (Br. 24-25), mean that remedies other than habeas corpus are foreclosed for citizenship determinations.[10]

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[9] *United States* v. *Ju Toy*, 198 U.S. 253 (1904); *Chin York* v. *United States*, 208 U.S. 8 (1907); *Tang Tun* v. *Edsell*, 223 U.S. 673 (1911); *Nq Fung Ho* v. *White*, 259 U.S. 276 (1922); *Quon Quon Poy* v. *Johnson*, 273 U.S. 352 (1926).

[10] *United States* v. *Gay*, 264 U.S. 353 (1924), for example, was an action by a naturalized citizen of the United States, then residing in Switzerland, against the United States for retirement pay to which he was entitled if a citizen. The Court of Claims entertained the action notwithstanding the claimant's residence abroad and determined citizenship. See cases discussed *infra* at pp. 36-38.

All that may be said for the doctrine of the cited decisions is that Congress may constitutionally attach finality to administrative determinations of citizenship of claimants not in the United States and that absent a showing of abuse of authority, including an error of law, the administrative decision may not be set aside.[11] *Gonzales v. Williams*, 192 U.S. 1 (1904).

Manifestly, they are not holdings that habeas corpus is the sole remedy permitted by the Constitution or by statutes for citizenship determinations or that it is a remedy at all for a person who asserts a right of citizenship but who has not been taken into the custody of government officers.

The cited decisions fail to establish that the "prevailing judicial view" prior to 1940 was that citizenship claims could be tested only by habeas corpus arising from exclusion proceedings for a further reason.

Each of the citizenship claimants in the cases invoked by appellant was a "Chinese person".[12] They were made the targets of special legislation by Congress, the Chinese Exclusion Laws, 22 Stat. 58, 23 Stat. 332, 24 Stat. 414, 26 Stat. 566, 25 Stat. 504, 27 Stat. 25, 32 Stat. 176, 33 Stat. 397, 428, one of which expressly provided habeas corpus as the remedy for a "Chinese person seeking to land in the United States to whom that privilege has been denied . . ." Act of May 5, 1892, 27 Stat. 25, 8 U.S.C. 286. The fact that the Chinese person may have claimed to be a citizen

[11] As appellant notes, the doctrine of *Ju Toy* may have diminished force, apart from the provisions of the Administrative Procedure Act (fn. Br. 47). Cf. *Medeiros v. Watkins*, 166 F.2d 897, dissenting opinion (Frank J.) 900 (C.A. 2, 1948); and *Carmichael v. Delaney*, 170 F.2d 239 (C.A. 9, 1948).

[12] Although appellant states that the rule of *Ju Toy* "was applied generally" (Br. 27), the decisions cited stand for no more than the principle described in *Chin Yow* that "Habeas Corpus is the usual remedy for unlawful imprisonment", *supra*.

of the United States and the privilege to land denied upon a failure to establish the claim administratively, as *Ju Toy*, held, did not enlarge the scope of review or afford another remedy.

This provision, which has since been repealed along with all of the other Chinese Exclusion Laws as a "historic mistake" (Act of December 17, 1943, 57 Stat. 600, H. Doc. 335, 78th Cong. 1st Sess.), was never extended by Congress or by the Courts to other persons who asserted a right to land in the United States as citizens.

In summary, appellant's analysis of the development of the law prior to 1940 has transposed a judicial doctrine which holds merely that no constitutional right to a trial *de novo* may be asserted by a nonresident citizenship claimant into a Congressional understanding in 1940 that no judicial relief was available to such a non-resident other than that of a writ of habeas corpus.

This is not what the expert Cabinet Committee[13] which prepared the draft Nationality Code told Congress in 1938.[14] In its comments regarding the legal remedies of persons abroad who had been denied recognition as American nationals, the authors of the explanatory comments which accompanied the code assumed that actions for a

[13] The Committee, composed of the Secretary of State, the Attorney General, and the Secretary of Labor, was appointed in 1933, at the request of the House Committee on Immigration and Naturalization, to recommend revisions and codification of the nationality laws for submission to Congress. After a five year study, a draft code was submitted in June, 1938. *Supra*, Ct. *Perez* v. *Brownell*, 356 U.S. 44, 52-53 (1958); *Trop* v. *Dulles*, 356 U.S. 86, dissenting opinion 125 (1958).

[14] Nor is it what the Immigration and Naturalization Service advised its employees in its Immigration Manual in 1946. In its exposition of "Judicial Review of Administrative Decisions", it indicated the availability of the "writ of mandamus" under the Federal Rules of Civil Procedure, the Declaratory Judgment Act, stating specifically that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate", and Section 503 of the Nationality Act of 1940. See pp. 13031-13032.

declaratory judgment or for a writ of habeas corpus were both available.

The report stated:

> "It may be added that a person who shall have been denied recognition abroad as an American national by a diplomatic or consular officer of the United States upon the ground that such person had expatriated himself by the performance of one of the acts specified in this chapter would not be without a legal remedy in case he should deem the ruling in his case unjustified and such ruling should be upheld by the Department of State. If such a person should be unable to take advantage of the provision of Section 274D of the Judicial Code, as amended by the act of Congress of June 14, 1934 (48 Stat. pt. 1, 955), concerning declaratory judgments, he might upon arrival at a port of entry into the United States and denial of entry as a national, resort to *habeas corpus* proceedings upon the ground that he is entitled to enter the United States as a national thereof. There seems to be no doubt as to the possibility of having a judicial decision in cases of this kind, if a person applying for admission to the United States as a national thereof submits substantial evidence of the facts upon which his claim to American nationality may be based but is denied a fair hearing upon the facts, *Chin Yow* v. *United States* (1907), 208 U.S. 8, or the facts being admitted, he is denied admission upon the ground that under the law he has not American nationality, *Weedin* v. *Chin Bow* (1927), 274 U.S. 657."

Codification of the Nationality Laws of the United States, H.R. Comm. Print. pt. 1, 76th Cong. 1st Sess., Section 406, pages 504-505.

We thus come to the enactment of the Nationality Act of 1940.

(B) *Section 503 of the Nationality Act of 1940*

As the appellant has mistakenly equated the form of judicial remedy with the scope in his analysis of the decisions of this Court, so too has he erroneously transposed the purpose of Section 503 of the Nationality Act of 1940 from that of permitting citizenship claimants *to enter the United States in order to prosecute their claims* into a purpose to permit the use of declaratory judgment actions as a "new remedy".

Perkins v. *Elg*, *supra*, establishes that declaratory judgments were already available as a remedy for securing determinations of nationality. See also *Borchard, Declaratory Judgments*, p. 398. Nonresidence of the plaintiff in such an action does not vitiate his right to maintain the suit. *Anderson, Actions for Declaratory Judgment*, pp. 324-325. Neither is it a jurisdictional requirement. District of Columbia Code, 11-306-306. *Stark* v. *Wickard*, 321 U.S. 288 (1944).

What Section 503 sought to provide was not the right essentially to bring an action for declaratory judgment, but it was to afford the opportunity for the person abroad who had filed such an action *to enter the United States* to pursue his claim.

Congressman Rees, one of the House Managers of the bill (H.R. 9980, 76th Cong. 3rd Sess.), in explanation of the purpose of Section 503, declared that

> ". . . it was deemed advisable that some chance be given them (persons abroad who had been expatriated) to have what might be called their day in court. . . . It was my contention when this measure was up for consideration that such people did have the right to do into court either on a declaratory judgment or

under a writ of habeas corpus, but there was a feeling on the part of others that they may not have that right."

86 Cong. Rec. 13247

The feeling to which Congressman Rees referred was asserted by a witness before the House Committee on Immigration and Naturalization, Mr. Henry F. Butler, who originated the proposal contained in Section 503. The focus of Mr. Butler's concern was the physical ability of the citizenship claimant to gain entry to the United States to prosecute an action.

Said Mr. Butler:

> "He (the expatriated citizen) has no opportunity to be heard and there is no provision in here for any review, and there is no court abroad which has jurisdiction over the case.
>
> "It is suggested rather naively that he could come to the United States and when denied admittance at the port of entry sue out a writ of habeas corpus and have his case tried.
>
> "But how is he to get to the port of entry unless he happens to be in a contiguous country, because it is a serious offense for a steamship company to bring to a port of entry a person who is not in possession of a valid document of admittance to this country. He would practically have to be a stowaway."
>
> House Committee on Immigration and Nationality, Hearings, *supra*, on H.R. 6127, at page 285, superseded by H.R. 9980, 76th Cong. 1st Sess., pp. 285-286.

That the problem was not whether there was a judicial remedy, but rather was whether a citizenship claimant could return to the United States to be heard is underscored no

only by the nature of Mr. Butler's criticism of the bill as drafted, but by comments of the spokesmen for the Department of State and the Immigration and Naturalization Service, and by the ultimate remedy which Section 503 provided.

Thus the State Department representative, Mr. Richard W. Flournoy, Jr., indicated in a colloquy with the Chairman of the Committee that a petition for declaratory judgment or for a writ of mandamus would be available to the citizenship claimant abroad:

> "The CHAIRMAN. Assuming now that the State Department, for instance, within its jurisdiction refuses the right of an individual to return; or the State Department from the evidence it has in hand feels that the individual has expatriated himself, and therefore has no right to return. Assume further that this man has some evidence to the contrary and yet he is away from his mother country, and in addition he wants to get into the courts of this country, anywhere in the United States, to question the right of the State Department to disfranchise him, and the point as I understand it, and I think you will agree with me, under that view of the matter, as indicated by Mr. Butler, he is deprived of a judicial review."
>
> . . .
>
> "The CHAIRMAN. The State Department could have counsel representing it in court; the Labor Department could be represented by counsel so long as it is somewhere within the jurisdiction of this country, but in a foreign country of course it would have no jurisdiction; he would be beyond the court and could not get a passport.

"Mr. FLOURNOY. In order to insure his appearance in court he would have to arrive here.

"The CHAIRMAN. In the absence of the man's entry it would not be a proper procedure.

"Mr. FLOURNOY. If he demands the right of entry as a citizen and his citizenship has been denied—

"The CHAIRMAN. You are raising the question about the procedure he would have to follow?

"Mr. FLOURNOY. Yes. The question remains, whether while still abroad he would not be able to resort to a petition for declaratory judgment or for a writ of mandamus.

"The CHAIRMAN. I should think, gentlemen, that we ought to go a little step further, if I am not interrupting your thought, Mr. Flournoy, to say that such person may, upon application, be permitted under certain conditions which may be specified by the Department of State or the Department of Labor to enter the United States for a short period of time as a temporary person only.

"Mr. FLOURNOY. Yes.

"The CHAIRMAN. Under guaranty of a bond, in order that he may proceed to bring his action for the purpose of determining the declaratory judgment and if he is denied that right he must go back."

* * *

Hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Cong. 1st Sess. on H.R. 6127 superseded by H.R. 9980, at pages 291-292.

The representative of the Immigration and Naturalization Service, Mr. Thomas B. Shoemaker, indicated his disagreement with the State Department position, but added his concern that even though he (the citizenship claimant abroad) should come over (to the United States) under some specific arrangement which was provided in the order, it would be open to question, at that point, whether you would ever get him out again". *Ibid.*

As enacted, Section 360 was therefore designed to permit a citizenship claimant abroad and who has instituted judicial action for a judgment declaring him to be a national of the United States, to be admitted to the United States upon a certificate of identity, subject to the condition that he shall be deported in the event of an adverse decision.

This remedy plainly bears no resemblance to an action such as the one brought below by the appellee, for a declaratory judgment in which the claimant can use the right or means of entry to the United States unless he has first prevailed in his claim to citizenship.

It is in this context that Section 360 of the present Immigration and Nationality Act must be understood.

(C) *Section 360 of the Immigration and Nationality Act of 1952*

The problem with which Congress was concerned when it formulated the provisions of Section 360 of the 1952 Act was the one which Mr. Shoemaker had mentioned [illegible] the use of certificates of identity by aliens seeking admission to the United States. It was not [illegible] pellant's brief seeks to convey — that the cases presented special and complex problems for the judicial process [illegible] (with) [illegible] factual issues difficult to resolve [illegible]

almost impossible to evaluate due to barriers of language and culture * * *." Br. 30.

The Report of the Senate Committee which conducted an intensive investigation of immigration and nationality problems for two-and-a half-years found no such problem. The sole issue which it asserted was that Section 503 "has been used in a considerable number of cases to gain entry into the United States where no such right existed." Senate Rep. 1515, Committe on the Judiciary, 81st Cong., 2nd Sess., p. 777. See also Joint Hearings, *supra*, pp. 108, 443.

Indeed, the present Solicitor General's predecessor conceded in this Court that the problem was the existence of numerous fraudulent entries to the United States by spurious citizenship claimants. See Petitioner's Brief, *Brownell v. Shung*, No. 43, October Term, 1956, fn. p. 54, where he stated the hearings on the 1952 Act:

> "indicate that the concern was with 'the fraud and derivative citizenship cases', and the fact that aliens not entitled to admission were gaining physical entry into the United States through Section 503 of the 1940 Act and then disappearing into the general populace * * * (citing the Joint Hearings) * * *."

As the appellant has noted, there were divergent approaches to the solution of the problem. But none of the suggested proposals was directed to the judicial remedies available under the Administrative Procedure Act, or, specifically, to the availability of the Declaratory Judgment Act. They were focused rather upon the method of modifying the Section 503 procedure in order to prevent the entry to the United States of spurious citizenship claimants.

The first versions of the immigration bills, S. 3455, *supra*, and S. 716, *supra*, limited the special declaratory judgment

proceedings to persons within the United States. The Immigration and Naturalization Service favored this proposal, noting in its Analysis of S. 716, *supra*, that:

> "Section 503 authorizes a person who is outside the United States to come to this country after filing such a suit in order to prosecute it to a conclusion * * *. The Service believes that, by limiting the availability of this section to persons within the United States, the *bill will remove from the law one method of obtaining easy entry into the United States.*" (Emphasis supplied.)

The Department of Justice and the State Department, however, were opposed to this draft. They favored changes in Section 360 in order to provide a continued opportunity for citizenship claimants to appear in the courts of the United States to obtain judicial determinations of the denials of their claims.

The proposals of the two departments were dissimilar. The Department of Justice favored a limitation of the judicial remedy in Section 360 to that of habeas corpus. It proposed the issuance of certificates of identity or special visas for "persons abroad who have more than a frivolous claim to citizenship" by means of which such persons could proceed to a port in the United States and apply for admission. The purpose, said the Department, was to permit the Immigration and Naturalization Service to "have as complete a record as possible on each person entering this country claiming to be a national thereof". Joint Hearings, *supra*, p. 721.

The State Department, for its part, favored the retention of Section 503, with the modification that the Secretary of State's decision on the issuance of certificates of identity shall be final. *ibid.* p. 710.

Section 360 (b) and (c) as adopted followed substantially,

the Department of Justice proposal. S. 2055. *Supra.* S. 2550. *Supra.* 8 USC 7503 (b)-(c). In describing the purpose of the provision, the Senate Judiciary Committee, stating that "*The bill modifies Section 503 of the Nationality Act of 1940*" explained that it provides:

> "that any person *who has previously been physically present in the United States but who is not within the United States* who claims a right or privilege as a national of the United States and is denied such right or privilege by any government agency *may be issued a certificate of identity for the purpose of traveling to the United States and applying for admission to the United States.* The net effect of this provision is to require that the determination of the nationality of *such person* shall be made in accordance with the normal immigration procedures. The procedures include review by habeas corpus proceedings where the issue of the nationality of the status of the person can be properly adjudicated." S. Rep. 1137, *supra*, p. 50. (Emphasis supplied.)

IV. The Legislative History and Statutory Language Show That the Habeas Corpus Remedy in Section 360 Is Not Exclusive.

The "such person" referred to in the Senate Report does not describe, as appellant would parse the paragraph, "a claimant not within the United States" (Br. 44). It refers instead to a "person who has previously been physically present in the United States, and who, being out of the United States, has been issued a certificate of identity for the purpose of traveling to the United States and applying for admission".[15]

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[15] In view of the subsequent change in the bill permitting this benefit to be granted persons under the age of 16 years who were born abroad

"Plainly, the legislative history and the language of Section 360 establish that its purpose was to eliminate the easy entry to this country which was permitted by the issuance of certificates of identity to citizenship claimants who had filed actions for declaratory judgments under the special statutory provisions of Section 503,[18] but at the same time to retain an opportunity for certain limited citizenship claimants to present themselves personally at a port of entry which, absent proof of citizenship or a valid visa, they could not do. Section 273, Immigration and Nationality Act, 66 Stat. 227, 8 U.S.C. 1323. Cf. Section 215, 66 Stat. 190, 8 U.S.C. 1185.

Thus, persons over the age of 16 years and those who have not previously been in the United States are denied this opportunity, notwithstanding the fact that under Section 301(a) of the Immigration and Nationality Act, 66 Stat. 235-236, 8 U.S.C. 1401, they may be citizens by reason of birth outside the United States to (3) citizen parents, (4) one citizen and one national parent, or (7) one citizen and one alien parent.

Appellant dismisses the problems of those citizenship claimants who are not "eligible for travel documents under Section 360(b)" and thus not able to review the denials of their claimants to citizenship in habeas corpus proceedings under Section 360(c) with the flourish that "this case does not involve them" (Br. 46).

But the fact that Congress has given citizenship to certain persons in Section 301 of the statute, with no mention

to a citizen parent, the phrase, as enacted, encompasses that person as well. 8 USC 1503(b).

[18] Which unlike the general Declaratory Judgment Act permitted the action to be brought against the Secretary of State in the district court for the district in which the litigant claims permanent residence rather than in the District of Columbia. Cf. *Savorgnan* v. *United States*, 338 U.S. 491, 493-4 (1949), and *Gong* v. *Biddle*, 60 F. Supp. 530, 531 (E.D. Penna., 1945).

of the method for vindicating *their* claims to citizenship in Section 360, manifestly indicates that Section 360 is neither the comprehensive enumeration of judicial remedies for determinations of citizenship nor the exclusive remedy for each of the persons described in Section 301.

There are, of course, numerous other actions in which the United States citizenship of a person may be established. The earliest decisions of courts of the United States determined citizenship claims of persons residing abroad in connection with the rights of inheritance to land. Thus, *McIlvaine* v. *Coxe's Lessee*, 2 Cranch. 280 (1805); 4 Cranch. 208 (1808) involved a New Jersey born resident of England and rendered judicial determination of citizenship in an action for land. *Inglis* v. *Trustees of the Sailor's Snug Harbor*, 3 Pet. 99 (1830), and *Shanks* v. *Du Pont*, 3 Pet. 242 (1830), similarly were actions, one a writ for recovery of land, the other a suit for partition, which required a determination of citizenship in the United States of residents abroad. Cf. *Oyama* v. *California*, 332 U.S. 633 (1947), in which a proceeding to escheat lands owned by aliens ineligible to citizenship involved the question of ownership of land by a minor United States citizen of Japanese ancestry. The minor citizen was a nonresident of California at the time of the proceeding, whether of Japan or Arizona would have made no difference. (637)

Earlier decisions of this Court presented libels involving the issue of citizenship in the United States for the legality of captures of vessels at sea and entitlement to prizes. In *Murray* v. *The Charming Betsy*, 2 Cranch 64 (1804), the legality of a seizure of a ship by an officer acting under the instructions of the President of the United States (67), turned upon whether the owner of the vessel, a nonresident, was a citizen of the United States. Although the Court (Chief Justice Marshall) determined that

the libelee was not a citizen, and held the capture of the vessel illegal, jurisdiction of the libel, of course, was not affected by the residence of the libelee.[17] Cf. *Talbot* v. *Jansen*, 3 Dall. 133 (1795); *Santissima Trinidad*, 7 Wheat. 283, 347 (1822).

The leading case of *MacKenzie* v. *Hare*, 239 U.S. 299 (1915), while not involving a citizenship claimant residing abroad, was an action in mandamus against election officials to compel registration as a voter in California. What is significant here is that the statute in issue and which this Court upheld there provided that:

> "At the termination of the marital relation she (the American woman who marries a foreigner) may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States * * *." 34 Stat. at L. 1228.

Clearly, if the issue of citizenship may be determined in an action for mandamus against a California election official to permit voting in a state election, it may also be decided in mandamus proceedings by an American woman, "if abroad", against the Secretary of State to compel registration as an American citizen with a consul of the United States pursuant to the express provision set forth in the statute.

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[17] Chief Justice Marshall, pertinent to the issue here, stated in his opinion (120) that "The American citizen who goes into a foreign country, * * * is yet * * * entitled to the protection of his own government * * *, and if * * * he should be oppressed unjustly, he would have the right to claim that protection * * *." In the Solicitor General's view, if the United States declined to protect the person abroad on grounds of lack of citizenship, the citizenship claimant must abandon the very residence abroad which he seeks to protect, in order to return to a port of entry of the United States, standing at its gates as an alien, in order to establish his citizenship and his right to protection abroad.

Finally, as has been noted earlier, a claim to citizenship asserted from abroad by a person who had been ruled expatriated was determined in *United States* v. *Gay*, *supra*, in an action for money judgment.

Claims to citizenship thus may be established in a variety of actions brought in the courts of the United States by nonresidents. Whether the ultimate relief sought is title to land, restitution of a vessel captured at sea, the right to be registered as a citizen with an American consulate abroad, a retirement pension, or, as here, a passport, obviously is not the determinant of the jurisdiction of the courts to entertain the action.

Appellant, with no Congressional language to support him, would read into Section 360(b) and (c) an intent by Congress to deprive persons abroad of all of the diverse judicial remedies which they have hitherto had when they have been "denied rights or privileges" upon the ground that they are "not nationals of the United States." Section 360(b).

Apart from the fact that nonresident citizenship claimants have had available to them historically the judicial remedies we have reviewed, appellant's position here is made the more anomalous by the decisions in *Stewart* v. *Dulles*, 101 App. D.C. 280, 248 F. 2d 602 (1957) and *Bauer* v. *Acheson*, 106 F. Supp. 445, (D.C. 1952).

In *Stewart*, a nonresident citizen living in England was able to maintain a declaratory judgment action in the United States District Court for the District of Columbia against the Secretary of State to litigate a far less substantial issue than here, namely, whether there was compliance with the administrative regulations required for the issuance of a passport. In *Bauer*, the plaintiff was a nonresident living in Paris, and, like the appellee below, challenged the con-

stitutionality of an act of Congress in asserting her right to a passport.[18]

Appellant's position is thus reduced to the absurdity that a person outside of the United States has the right to judicial review of his claim to citizenship for any relief except that of a passport, and he has the right of judicial review to obtain a passport upon any ground except that of citizenship.

More, in view of *Kent* v. *Dulles* (see fn. 18), an American citizen would be able to exercise his constitutional liberty to travel abroad but only at the risk, if the appellant's view were to prevail, of losing his citizenship without judicial recourse. Needless to say, the right to travel cannot be so inhibited.

The absurdity is compounded in the light of *Flemming* v. *Nestor*, 363 U.S. 603 (1959). There, an alien who had been deported from the United States was able, while in Bulgaria, (which the United States then did not recognize)[19] to maintain a declaratory judgment action in the District Court for the District of Columbia to challenge the constitutionality of an act of Congress. While it is true that Section 205(g) of the Social Security Act, 53 Stat. 1370, as amended, 42 U.S.C. 405(g), relevant there, provides for judicial review without limitation as to nonresidents or alienage, it seems dubious that Congress could have intended that nonresident aliens should have the right to bring actions from abroad to challenge the constitutionality of an act of Congress, but to have precluded that right to a native-born citizen of the United States who has been ex-

[18] Although this Court has not passed upon the jurisdictional issues in these cases, *Kent* v. *Dulles*, 357 U.S. 116, 125, 126 (1957) assures that the right of travel may not be deprived without due process of law, which certainly, as to an American citizen even if then outside of the United States, includes the right of judicial review of passport denials.

[19] Dep't State Press Release 226 (1959).

patriated under a statute adopted by Congress. Cf. *Puig v. Jiminez*, 255 F. 2d 54 (C.A. 1, 1958).

Yet this is the effect of the Solicitor General's argument to this Court.

In summary, all that can be said for Section 360(b) and (c) is that Congress has chosen to provide two classes of citizenship claimants—persons who have had prior physical presence in the United States and persons under the age of 16 years born abroad of a citizen parent—with an opportunity to come to a port of entry in the United States to litigate their claims to citizenship.

V. Section 360(c) Is Not a "Special Statutory Review Proceeding"

Appellant has not posited his argument that Section 360(c) is exclusive, as we have observed earlier, upon any claim that it is a "special statutory review proceeding" within the meaning of Section 10(b) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(b).

His brief relies rather upon the art of ambiguity. For he says vaguely that "Section 360 establishes special procedures for determining claims to American citizenship by those within and without the country." (Br. 23.)

The judicial procedure referred to in Section 360(c) is habeas corpus. This remedy, deriving as it does from the Constitution is, of course, not a "special procedure", as appellant himself has observed on other pages of his brief (Br. 12-13, 24-27). Neither can it be deemed a "special statutory review proceeding" within the meaning of the Administrative Procedure Act. This is so both because habeas corpus is not such a proceeding and because the action which a citizenship claimant would have under Section 360(c) is not against the Secretary of State who has refused to recognize his citizenship and has denied him a passport, but it is against the officer of the Immigration and

Naturalization Service who will not let him into the United States and who holds him in detention.

The appellant, in effect, would immunize the Secretary of State from suit by those whom he had deprived of citizenship. This position, apart from being contrary to the provisions of the Administrative Procedure Act which provides that "any person suffering legal wrong because of *any agency action* . . . shall be entitled to judicial review *thereof*" 5 U.S.C. 1009(a), would constitute a taking of life, liberty and property without due process of law in violation of the Fifth Amendment. (Emphasis supplied.)

For the effect of appellants' position, assuming that a citizenship claimant obtained a certificate of identity, as permitted in Section 360(b), is to require the claimant to come to the United States, not as a citizen, but as an alien and to be "subject to all the provisions of the (Immigration and Nationality) Act involving *aliens* seeking admission to the United States" (8 U.S.C. 1503(c)). (Emphasis added).

The claimant could be held in detention without bond and afforded no constitutional guaranty of due process while attempting to vindicate his claim to citizenship. *Shaughnessy* v. *Mezei*, 345 U.S. 205 (1952).

Although this Court's decision in *Na Fung Ho* v. *White*, *supra*, 284-285, involved a citizenship claimant in the United States, in view of this Court's repeated subsequent holdings in expatriation cases[20] Justice Brandeis' language there seems sufficient to protect a native-born citizen of the United States, who has been expatriated by an administrative action, regardless where he may live:

> ". . . Against the danger of such deprivation (of citizenship) without the sanction afforded by judicial pro-

[20] *Schneiderman* v. *United States*, 320 U.S. 118 (1942); *Baumgartner* v. *United States*, 322 U.S. 665 (1943); *Gonzales* v. *Landon*, 350 U.S. 920 (1955); *Nishikawa* v. *Dulles*, 356 U.S. 129 (1957).

ceedings, the 5th Amendment affords protection in its guaranty of due process of law" (284-285) [21]

VI. The Objectives Which Appellant Describes for Section 360 Do Not Require a Holding That It Is Exclusive.

The Solicitor General suggests that the objective of Section 360 was to require citizenship claimants abroad to go through "screening, interrogation, and investigation" of an expert agency (the Immigration and Naturalization Service) (Br. 40-42). "State Department officials abroad cannot, in the nature of their duties and responsibilities", he says (Br. 41), "conduct the type of detailed inquiry and formal hearings available at a port of entry of the United States."

This rationalization for depriving citizenship claimants abroad of the judicial remedies permitted by the Administrative Procedure Act can be made by the Solicitor General only in ignorance of the manifold functions and duties of the Secretary of State.

Section 104(a) of the Immigration and Nationality Act, 64 Stat. 174, 8 U.S.C. 1104, provides that the "Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to . . . (3) the determination of nationality of a person not in the United States."

State Department officials thus constantly make determinations of nationality, in and out of the United States, in the issuance of passports, Cf. 22 C.F.R. 51, in the issuance of certificates of loss of nationality, Cf. 22 C.F.R.

[21] The doctrine of *Ju Toy*, *supra*, is inapposite because no issue of *expatriation* was involved but only whether the claimant to citizenship had established his claim.

50, and in the issuance of visas to persons who are related to citizens of the United States (Cf. Sections 101(a) 27 and 203, Immigration and Nationality Act, 66 Stat. 169, 178-179, 8 U.S.C. 1101, 1152; 22 C.F.R. 42.

It seems needless to say, in response to the implications of the Solicitor General's brief (Br. 41, 42), that the officials of the State Department are as "expert" as those of the Immigration and Naturalization Service in "appraising obtuse and difficult factual allegations", in "sifting out the manifestly frivolous claim", in "illumining and sharpening the basic facts in the issue", and in "adding new evidence". The hearing which is required for the Immigration Service determinations is no less required for State Department determinations. Cf. *Baker* v. *Acheson*, *supra*.

Indeed, in view of the Solicitor General's suggestion (Br. 39) that the federal courts, sitting as they do in the United States, found it "almost impossible to evaluate" the factual issues involved in the citizenship claim "with respect to events occurring . . . thousands of miles away" because "of barriers of language and culture", the appellant, if not his counsel, might well argue that the State Department officials abroad are better equipped to "screen, interrogate, and investigate" the citizenship claims of nonresidents than are the Immigration Service officials.

Whichever other agency performs the function, inasmuch as Congress has given the Secretary of State the duty "to determine nationality of a person not in the United States", 8 U.S.C. 1104, *supra*, the Solicitor General's suggestion that the purported objective of Section 360 cannot be met unless the Immigration and Naturalization Service performs the screening, the interrogation, and the investigation of citizenship claimants is transparently a frivolous contention.

Conclusion

For the reasons the amicus curiae has advanced, there is no warrant in the prior decisions of this Court, there is no basis in the legislative history of the Immigration and Nationality Act of 1952, and there is no requirement in the statutory language contained in Section 360 of that Act for the doctrine that a nonresident claimant to citizenship may not maintain an action for a declaratory judgment to determine whether he is a citizen of the United States.

Accordingly, the decision of the court below on the issue of jurisdiction should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1961.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 20

DEAN RUSK, SECRETARY OF STATE, APPELLANT

v.

JOSEPH HENRY CORT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANT

We treat, in this reply brief, only with the point that Section 360 of the Immigration and Nationality Act of 1952 was designed by Congress to provide the exclusive procedure for a person in appellee's position to test his claim to United States citizenship (Point I of our main brief, pp. 23 *et seq.*; Point I of Appellee's Brief, pp. 15–28; *Amicus* Brief for the American Civil Liberties Union; Point I of *Amicus* Brief for Angelika Schneider, pp. 6–12). The discussion in the opposing briefs of the Congressional background and history of Section 360, as well as certain assumptions in those arguments, makes appropriate a somewhat more detailed consideration of the statute and the relevant materials.

CONGRESS INTENDED SECTION 360 TO PROVIDE THE EXCLUSIVE PROCEDURE FOR A PERSON IN APPELLEE'S POSITION TO TEST HIS CITIZENSHIP CLAIM

In our view, the wording, structure, background, and history of Section 360 support the following interrelated propositions:

(i) Since the Nationality Act of 1940, Congress has dealt specifically, in its nationality legislation, with the problem of judicial testing of a denial of citizenship rights, and has provided a special exclusive statutory procedure to be used by the claimants—both residents and non-residents—in lieu of (and not in addition to) the general types of declaratory and injunctive relief which might otherwise be available under the general law; Section 360 is the special procedure, "occupying the field," which governs this case.

(ii) In enacting Section 360 as part of the 1952 Act, Congress was concerned with the too-free use of declaratory relief by non-resident claimants (not merely with their physical entry under the certificate-of-identity procedure of the 1940 Act) in order to obtain determinations of American citizenship; Congress desired to cure this defect by cutting off declaratory (and injunctive relief) for non-resident claimants and requiring them to pursue normal immigration procedures (including investigation by the Immigration and Naturalization Service, and judicial relief by way of habeas corpus); accordingly, it restricted declaratory relief to citizenship claimants who are within the United States.

We have, we believe, documented these propositions in our main brief. Here, we discuss them further in the light of the particular arguments presented by appellee and the *amici*.

A. SECTION 360 PROVIDES AN EXCLUSIVE SELF-CONTAINED PROCEDURE FOR CITIZENSHIP-CLAIMANTS.

1. THE TERMS AND STRUCTURE OF SECTION 360 SHOW THAT THE PROVISION IS SELF-CONTAINED AND THAT OTHER DECLARATORY AND INJUNCTIVE RELIEF IS PRECLUDED

The gist of the opposing argument is that Section 360 does not stand in the place of other declaratory and injunctive relief under the Declaratory Judgment and Administrative Procedure Acts, but merely provides an additional remedy to be used if the claimant desires. This position is perhaps most clearly refuted by the history and background of the section (Govt. Main Br. 24–43; *infra*, pp. 10–15), but we submit that the section's bare terms and structure also show that it was intended as a special, comprehensive, and exclusive procedure by which claimants to citizenship were to pursue their claims.

(*a*). The exclusiveness of the procedure is shown, first, by the fact that the section expressly covers the entire universe of citizenship-claimants—those "within the United States" (subsection (a)), and those "not within the United States" (subsections (b) and (c))—and each half of the section is complete in itself. Such an all-inclusive provision is not normally read as leaving gaps to be filled by application of the general law, or as having only partial coverage. Rather, the presumption is that the subject matter has been fully covered, explicitly and implicitly, within the confines of the provision.[1]

[1] Section 503 of the 1940 Act (Govt. Main Br. 5–6) likewise covered persons within and without the United States, and provided within itself a complete procedure for citizenship-claimants. See *infra*, pp. 7–9.

(*b*). Certainly, subsection (a) (Govt. Main Br. 3), covering "any person who is within the United States", cannot be interpreted as merely providing an additional remedy, supplementary to other declaratory (and comparable) remedies which continue to be available under the Declaratory Judgment and Administrative Procedure Acts. Subsection (a), in explicit terms, establishes an action for citizenship-claimants under the Declaratory Judgment Act (28 U.S.C. 2201) (to which it refers), and at the same time expressly prohibits such a suit where (a) the issue of nationality is or was connected with an exclusion proceeding, or (b) the administrative denial of citizenship rights occurred more than five years before institution of the action. If these specific limitations could be disregarded or avoided by the easy device of an "ordinary" declaratory action by the resident claimant, there would have been no purpose in enacting subsection (a), with its express limitations. Indeed, it is hard to see why Congress, if it shared appellee's view, did not simply leave the entire problem of declaratory relief to the general Declaratory Judgment Act without any special mention or provision in the 1952 Act.[3]

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[3] In *Frank* v. *Rogers*, 253 F. 2d 889 (C.A.D.C.), upon which appellee relies, the court of appeals held that an individual ordered deported, who brought a declaratory action in the District of Columbia to test the deportation order (see *Shaughnessy* v. *Pedreiro*, 349 U.S. 48), was not required by Section 360 to institute a *separate* action in the district of his residence in order to challenge the deportation order on the ground that he was a citizen, not an alien, but could raise that issue in the regular declaratory action challenging the order. This was

(*c*). Moreover, the face of Section 360 suggests strongly that Congress did not wish to extend declaratory relief (apart from possible declaratory relief incident to review of an exclusion order) to those individuals whose status as Americans was questioned during a period when they were abroad. Under subsection (a), declaratory relief cannot be obtained, even by a person within the United States, if the citizenship issue arose previously in connection with an exclusion proceeding or is currently an issue in such a proceeding. Subsections (b) and (c) carry forward the same concept by providing that persons not within the United States should challenge a denial of citizenship by seeking admission, and then testing their claim in exclusion proceedings. In short, Congress took pains to limit the declaratory relief it was providing to those (unlike appellee) whose nationality status is questioned while they are within this country. The others were to take the immigration route.[3]

(*d*). In the light of its terms and structure, Section 360 is properly characterized as establishing a special comprehensive statutory procedure, superseding the provisions of general law, for pursuing claims

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obviously an unusual situation in which no substantial purpose would be served by requiring the plaintiff to bring another suit in another forum, and unnecessary multiplicity of actions would be avoided by permitting the issue of nationality to be tried in the District of Columbia along with the other attacks upon the deportation order.

[3] The legislative history of Section 360 (Govt. Main Br. 30–37; *infra*, pp. 10–15) confirms that this was the Congressional purpose.

to citizenship. The Declaratory Judgment Act (28 U.S.C. 2201) as well as the general jurisdictional provisions for the District Court for the District of Columbia—which might be applicable in the absence of Section 360—were intended to give way to the specific requirements of that section.

As for the Administrative Procedure Act, Section 10(b) of that statute, 5 U.S.C. 1009, provides that "[t]he form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute"—thus envisaging precisely the type of statutory proceeding of which Section 360 is an example. There is full consonance with, rather than modification or supersession of, the Administrative Procedure Act, and therefore Section 12, 5 U.S.C. 1011 (Appellee's Br. 5), dealing with supersession by subsequent legislation, has no application. In any event, as this Court held with respect to other provisions of the Immigration and Nationality Act, in *Marcello* v. *Bonds*, 349 U.S. 302, 308, 310, the later Act's detailed coverage of the same subject matter dealt with generally in the Administrative Procedure Act shows that Congress was setting up a specialized procedure applicable to nationality claims, superseding any contrary provision of the earlier statute.[4]

[4] For both of these reasons—that Section 360 provides "special statutory review proceedings[s]" under Section 10(b) of the Administrative Procedure Act, and also that this specialized procedure supersedes the general provisions of Section 10 to the extent they are inconsistent—neither *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, nor *Brownell* v. *Tom We Shung*, 352 U.S. 180, is in point. Those cases held declara-

2. THE PREDECESSOR PROCEDURE ESTABLISHED BY SECTION 503 OF THE 1940 ACT WAS ALSO SELF-CONTAINED AND EXCLUSIVE

Section 360 of the 1952 Act stemmed from another self-contained provision of the nationality laws—Section 503 of the Nationality Act of 1940 (Govt. Main Br. 5–6). Appellee and the *amici* err in treating Section 503 as if it, too, merely supplemented the Declaratory Judgment Act and provided an additional remedy. Congress did not so view Section 503. On the contrary, that section established a special statutory procedure for declaratory relief in lieu of any other which might have in time developed under the Declaratory Judgment Act.

Prior to the 1940 Act, the existence of declaratory relief for a non-resident citizenship-claimant was, at best, very doubtful. The area was almost wholly unexplored. The Declaratory Judgment Act was itself only six years old. It was applied, in 1939, to a suit by a *resident* citizenship-claimant to establish her nationality (*Perkins* v. *Elg*, 307 U.S. 325), but up until that case reached this Court the government contended that the Declaratory Judgment Act could not be used even for that purpose (R. in Nos. 454–455, O. T. 1938, at pp. 27–28, 29, 39–40). As shown in our main brief (pp. 24–27), prior to the 1940 Act declaratory relief was not accorded to claimants residing abroad or seeking admission; habeas corpus was considered

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tory relief available to review deportation and exclusion orders under the 1952 Act, but with respect to such orders the statute did not contain any detailed, specialized, explicit review provision comparable to Section 360; in fact, the 1952 Act made no provision at all for judicial review.

to be the appropriate remedy and was the route actually pursued.

The argument is made (Appellee's Br., p. 20; *Amicus* Br. for the A.C.L.U., pp. 27–31) that at the Congressional hearings on the 1940 Act—before Section 503 was added to the bill (see Govt. Main Br. 28; fn. 9)—government spokesmen assumed that declaratory relief would be available under the Declaratory Judgment Act. But the hearings show, rather, that the chief witness for the immigration bar, the government witnesses, and the Congressmen were all very uncertain as to the existence of any such declaratory remedy. See Hearings before the House Committee on Immigration and Naturalization on H.R. 6127 superseded by H.R. 9980, 76th Cong., 1st Sess., pp. 285–286, 290–291, 292–3.[*] And the formal comment of the Cabinet Committee carefully left open the question whether a citizenship-claimant abroad could take advantage of the Declaratory Judgment Act. See the quotation in the A.C.L.U. Brief, p. 26, and Hearings, *supra*, at p. 504.

It was for the very reason that the availability of declaratory relief was so uncertain, as pointed out in our main brief (pp. 28–29), that Section 503 was included in the 1940 Act. Congress desired, in view of the many new loss-of-nationality provisions, to assure citizenship claimants the declaratory relief which might not otherwise be available. In fulfill-

[*] The representative of the Immigration and Naturalization Service seems plainly to have assumed that only habeas corpus would be available. Hearings, *supra*, at pp. 292–3.

ment of that purpose to create a new remedy, the first sentence of Section 503 (Govt. Main Br. 5) affirmatively and expressly established a declaratory cause of action for *all* citizenship claimants, within or without the United States.[7] In addition, Section 503 established the certificate-of-identity procedure for those outside the country, but this supplementary provision serves to support the point we stress—that Congress created a self-contained special statutory procedure for declaratory relief for citizenship-claimants, in the place of any remedy that might then have existed in embryo in the Declaratory Judgment Act. Though Section 503 of the 1940 Act and Section 360 of the 1952 Act differ considerably in the remedies they provide, they are alike in establishing exclusive procedures for testing claims of United States nationality.[8]

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[7] Congress surely did not include this sentence in Section 503 solely to provide a venue in addition to that provided in the Declaratory Judgment Act—as appellee suggests (Appellee Br., p. 20).

We do not suggest that the Declaratory Judgment Act is or was unavailable to plaintiffs simply because they are overseas, but only that it was unavailable to test their *nationality* claims. It could, of course, be used to vindicate *other* rights and claims.

[8] Since the present case does not involve an overseas claimant who would not be eligible to apply for a certificate under Section 360(b)—*i.e.*, a claimant never physically present in the United States and over 16 years—we need not discuss the rights of such an individual. But it is appropriate to say that, if judicial relief is available, it would be because of the force of the Constitution, not because Congress intended to accord such a right.

B. THE LEGISLATIVE HISTORY OF SECTION 360 SHOWS THAT CONGRESS INTENDED TO REQUIRE NON-RESIDENT CLAIMANTS TO TEST THEIR NATIONALITY CLAIMS BY SEEKING ADMISSION TO THE COUNTRY

Section 360 was passed "with the evident intention of limiting the opportunity of persons claiming to be citizens to seek a judicial declaration of their rights". *Puig Jimenez* v. *Glover*, 255 F. 2d 54, 56 (C.A. 1). The persons whose opportunity was to be thus limited were non-residents like appellee.

1. As explained in our main brief (pp. 30*ff*), in the enactment of the 1952 Act Congress was concerned with the large number of overseas claimants—mainly of Chinese descent—whom it considered to have misused the liberal declaratory judgment and certificate-of-identity procedures of Section 503 of the 1940 Act. Appellee and the *amici* say that this concern was only with the certificate-of-identity system, not with the mere bringing of a declaratory action from abroad (see, *e.g.*, Appellee's Br. 20–22). But this was plainly not the case. The dominant forces in Congress thought that the declaratory action itself had been abused and should be eliminated for those not within the country. The basic initial report of the Senate Judiciary Committee on the new legislation flatly recommended that the provisions of Section 503 "be modified to limit the privilege [of bringing a declaratory action] to persons who are in the United States" (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 777), and provided no form of judicial relief at all for those abroad. If

physical entry under a certificate of identity had been the only focus of concern, the Committee obviously would not have confined the right of declaratory relief, in itself, to persons already in the country, but would have permitted a declaratory action to overseas claimants while forbidding their coming to the United States under a certificate of identity.

The fact is that the problem worrying the Congress was not only the possible disappearance of certificate-of-identity entrants into the general population, but also that declaratory actions, without appropriate advance investigation by the Immigration and Naturalization Service and the making of a record in which that agency participated, could and did lead to the presentation of fraudulent and unsupported claims difficult to detect and overcome in the normal type of declaratory judgment trial. In addition, there was concern "about the flooding of the courts by such declaratory judgment actions" (*Puig Jimenez* v. *Glover*, 255 F. 2d 54, 56 (C.A. 1)). See Govt. Main Br. 30–31.[9]

[9] Appellee (Br. 21–23) (as well as the *amici*) put misplaced stress on the use of the word "entry" in certain observations and reports while the measure was under consideration in Congress. A non-citizen who gains entrance into the country as a citizen, through a declaratory judgment based on fraudulent or inadequate evidence, is properly said "to gain entry into the United States where no such right existed". See S. Rep. No. 1515, 81st Cong., 2d Sess., p. 777. "Entry" can come as the ultimate result of a successful suit, as well as under the certificate-of-identity procedure. If appellee were to prevail in the present action, he would gain entry into the United States as a result of the judgment, although he did not obtain a certificate of identity or come to the country under the aegis of such a document.

The Senate Committee's proposal for limitation of declaratory relief to claimants in the United States was carried into its first bills, and thereafter the versions of the bill recommended by the Senate Committee or passed by the Senate restricted the declaratory action to such persons. Only the House versions extended the declaratory remedy to certain overseas claimants, and as we point out in our main brief (p. 36) the Conference Committee and the Congress clearly adopted the Senate version. From first to last, the Senate insisted that declaratory relief be available only to claimants within the United States, and the Senate's view prevailed.

2. Conversely, the Senate, and ultimately the Congress, did adopt the suggestion (now embodied in Sections 360(b) and 360(c)) made by the Deputy Attorney General that claimants abroad should be "required to apply for admission to the United States at a port of entry and go through the *usual screening, interrogation, and investigation*, applicable in the cases of other persons seeking admission to the United States, *so that the Immigration and Naturalization Service will have as complete a record as possible on each person entering* this country claiming to be a national thereof". Govt. Main Br. 33 (emphasis added).[10] In proposing a form of Section 360 almost identical with that finally adopted by Con-

[10] This recommendation of the Department of Justice, accepted by Congress, is a primary source of the suggestion in our main brief (pp. 39–43) that Congress was interested in obtaining as complete a record as possible, after Service investigation and inquiry.

gress, the Senate Committee characterized subsections (b) and (c) as *requiring* the determination of the nationality status of overseas claimants to "be made *in accordance with the normal immigration procedures.*" Govt. Main Br. 34 (emphasis added). Those procedures would include expert investigation and the making of a formal record at a hearing at which the claimant would be available. See Govt. Main Br. 42–43.

If appellee were right and a declaratory action could be brought by a person outside the United States, a conclusive determination of nationality would be made without the "usual screening, interrogation, and investigation" applicable to those seeking admission; without the Immigration and Naturalization Service being able to build "as complete a record as possible"; and without following "the normal immigration procedures." That result would run directly counter to the stated Congressional purpose.

3. Substantial arguments can, of course, be advanced why Congress could or should have been more liberal and less restrictive. But in interpreting Section 360 the controlling considerations are what was done by the Congress which considered and passed it, and the factors which moved that Congress to take the action it did. In effect, the Congress—rightly or wrongly dissatisfied with the experience under Section 503 of the 1940 Act—returned, so far as claimants abroad are concerned, to the situation (which had lasted for decades) when citizenship claimants outside

the country had to test their status by applying for admission and pursuing their judicial remedy in habeas corpus proceedings.

It was the legislative choice to return to pre-declaratory judgment days, but at the same time to facilitate the attempt to gain admission by continuing (in that context) the certificate-of-identity system established by Section 503 of the 1940 Act.[11] It may normally be harder on the claimant to follow the procedures of Sections 360(b) and 360(c) than it would be to bring a simple declaratory action like appellee's. But these difficulties are of the same order of magnitude as existed prior to 1940, and to a large extent are the same as those under the certificate procedure of the 1940 Act. Congress has not chosen novel procedures, more burdensome than others of the past. It has chosen, for reasons which seemed proper to it, to require a procedure well known in our past, even the recent past.

4. Finally, it bears noting that, while the 1952 Act was going through Congress, the provision which ultimately became Section 360 was regarded by opponents of the bill (including representatives of the Association of Immigration and Nationality Lawyers) as cutting off declaratory relief for claimants not specifically granted such a remedy by the section itself. See, e.g., Joint Hearings before the Subcommittees of

[11] With respect to persons in Mexico and Canada, the Department of Justice, with the concurrence of the Department of State, has adopted the policy that such individuals need not take the preliminary step of securing certificates of identity before making an entry application at the border.

the Committees on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., at pp. 106–108, 443–444, 527, 673. And President Truman, in vetoing the bill, stated that "Judicial review of administrative denials of citizenship would be severely limited and impeded in many cases, and completely eliminated in others". H. Doc. No. 520, 82d Cong., 2d Sess., p. 7 (veto message). We cite these remarks because they indicate that, on this aspect of the measure, its opponents agreed with its proponents as to the impact of the new legislation.

CONCLUSION

For these reasons and those stated in our main brief, it is respectfully submitted that the judgment below should be reversed.

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No. 80

IN THE

Supreme Court of the United States

October Term, 1961

DEAN RUSK, Secretary of State,
Appellant,

—v.—

JOSEPH HENRY CORT,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPENDIX TO APPELLEE'S BRIEF
(Legislative Materials)

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IN THE

Supreme Court of the United States

October Term, 1961

No. 20

Dean Rusk, Secretary of State,

Appellant

v.

Joseph Esposito,

Appellee

On Appeal from the United States District Court for the District of Columbia

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APPENDIX TO APPELLEE'S BRIEF

(Legislative Materials)

Statement

Appellee respectfully requests leave to file the Appendix consisting of certain statutes or legislative materials believed to have a bearing upon this case.

Respectfully submitted,

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Appendix

1. The Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. 211a provides, in pertinent part, as follows:

> The Secretary of State may grant, issue, or verify passports, and cause passports to be granted, issued, or verified in foreign countries by diplomatic representatives of the United States, and by such consular officers, consular service of the United States, as the Secretary of State may designate, and by the chief or other executive officers of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. The Act of June 14, 1902, 32 Stat. 386, 22 U. S. C. 212 provides, in pertinent part, as follows:

> No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.

3. Immigration and Nationality Act of 1952, 8 U. S. C. 1101 *et seq.*, 66 Stat. 163, provides in pertinent part:

> SEC. 104. (a) The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to (1) the powers, duties and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas; (2) the powers, duties and functions of the Bureau of Security and Consular Affairs; and (3) the determination of nationality of a person not in the United States. He shall establish such regulations; prescribe such forms

of reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out such provisions. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the department or independent establishment under whose jurisdiction the employee is serving, any of the powers, functions, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Department of State or of the American Foreign Service.

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

• • •

(28) Aliens who are, or at any time have been, members of any of the following classes:

• • •

(C) Aliens who are members or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided*, That nothing in this paragraph, or in any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

• • •

SEC. 235.

. . . .

(c) Any alien (including an alien crewman) who may appeal to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under paragraphs (27), (28), or (29) of section 212(a) shall be temporarily excluded, and no further inquiry by a special inquiry officer shall be conducted until after the case is reported to the Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, considers would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman.

SEC. 236. (a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 235 shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be con-

ducted in accordance with this section, the applicable provisions of sections 235 and 287 (b), and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

(b) From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General and any such alien shall be advised of his right to take such appeal. No appeal may be taken from a temporary exclusion under section 235 (c). From a decision of the special inquiry officer to admit an alien, the immigration officer in charge at the port where the inquiry is held may take a timely appeal to the Attorney General. An appeal by the alien or such officer in charge, shall operate to stay any final action with respect to any alien whose case is so appealed until the final decision of the Attorney General is made. Except as provided in section 235 (c) such decision shall be rendered solely upon the evidence adduced before the special inquiry officer.

(c) Except as provided in subsections (b) or (d), in every case where an alien is excluded from admission into the United States, under this Act, or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

* * *

SEC. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regula-

tions prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

SEC. 359. The Secretary of State is hereby authorized to issue, in his discretion and in accordance with rules and regulations prescribed by him, a certificate of nationality for any person not a naturalized citizen of the United States who presents satisfactory evidence that he is an American national and that such certificate is needed for use in judicial or administrative proceedings in a foreign state. Such certificate shall be solely for use in the case for which it was issued and shall be transmitted by the Secretary of State through appropriate official channels to the judicial or administrative officers of the foreign state in which it is to be used.

4. Statement of Peyton Ford, Deputy Attorney General to the Senate Committee on the Judiciary (Hearings on S. 716 *et al.*, 82d Congress, 1st Sess., pp. 711-712, 720-721):

* * *

Section 106: Section 19 of the Immigration Act of February 5, 1917 (8 U. S. C. 155), provided that an alien falling within certain deportable classes should be taken into custody and deported on the warrant of Attorney General and that his decision should be final. In exclusion cases (secs. 16 and 17, act of February 5, 1917) a somewhat fuller provision was made whereby an alien who was not found clearly entitled to land by an examining inspector would be held for a Board of Special Inquiry whose decision would be final unless appealed to the Attorney General. So far as judicial review is concerned, the immigration statutes were silent. Over some three-quarters of a century there developed a process of judicial review through the writ of habeas corpus. The main effect of section 106 is to spell out for the first time the power of judicial review of the ad-

ministrative process. The administrative process is detailed with reference to exclusion in section 236, and with reference to deportation in section 242 of the bill. The provisions of sections 236, 242, and 106 taken together express in statutory terms what has been developed over the course of years as the means of administering the laws and having that administration reviewed through judicial process. It differs from the Administrative Procedure Act, which the Department believed to be inapplicable to immigration processes prior to the Supreme Court decision in *Wong Yang Sung* v. *McGrath* (339 U. S. 33), decided February 20, 1950. The result of that decision was a provision in the Supplemental Appropriations Act for the fiscal year 1951, approved September 27, 1950, providing that administrative hearings under the immigration processes should not adhere to the adjudicative provisions of the Administrative Procedure Act. Section 106 of this bill undertakes to state what has been the traditional provision for judicial review, i.e., habeas corpus. That writ affords the expeditious consideration so necessary if the immigration statutes are to be effectively enforced. The provisions of sections 106, 236, and 242 afford a time-tested and efficient procedure for the administration of this bill.

If deportation hearings under the bill were to be subjected to the requirements of the Administrative Procedure Act it is estimated, according to a study made last year by the Immigration and Naturalization Service in conjunction with the Bureau of the Budget, that the cost of conducting such hearings, together with incidental expenses, would be approximately an additional $4,460,000 for the first year and probably more for subsequent years.

* * *

Section 360: This section provides for the institution of a judicial proceeding against any executive department or independent agency, for determining the nationality status of any person who is denied the right or privilege as a national of the United States by such executive agency, or any executive official thereof. The section is available only to persons who are within the United States. No such action may be

instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of or in connection with any deportation or exclusion proceeding, or (2) is in issue in any such deportation or exclusion proceeding.

This section is designed to replace section 503 of the Nationality Act of 1940. That section permits individuals who are denied privileges as nationals of the United States to bring a judicial action to test the legality of such a denial. However, section 503 authorizes a person who is outside the United States to come to this country after filing such a suit in order to prosecute it to a conclusion. Provision is made for his deportation if the court finding is that he is not a national of the United States. A certificate of identity is granted to such a person by a consular officer, and, in case of refusal to issue such a certificate, an appeal to the Secretary of State is authorized.

Section 360 is obviously intended to prevent the institution of a judicial action to review findings made in an exclusion or deportation proceeding while such proceedings are pending, or have been concluded. Under the language of the section, it would appear that even though the deportation or exclusion proceeding may have terminated, this remedy will not be available to any person for the purpose of obtaining judicial review of any issue of citizenship or nationality which may have arisen in connection with, or by reason of, such deportation or exclusion proceeding. The remedy of habeas corpus would, of course, still be available.

The Department of Justice objects to the enactment of section 360 unless it is amended to provide for the protection of persons abroad who have more than a frivolous claim to citizenship but who are unable to obtain a United States passport. To protect such persons the Department recommends adding to section 360 language which would permit the issuance to such persons of a special certificate of identity or a special "visa." That document should be described in such a manner as merely to authorize the person in question to proceed to a port in the United States and apply for admission as a national, in the usual manner. If his application for admission as

a national of the United States is administratively denied, the applicant will have review through habeas corpus in the United States courts in the usual manner. However, the intent of this suggestion is that the person claiming citizenship shall be required to apply for admission to the United States at a port of entry and go through the usual screening, interrogation, and investigation applicable in the cases of other persons seeking admission to the United States, so that the Immigration and Naturalization Service will have as complete a record as possible on each person entering this country claiming to be a national thereof.

5. Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171-1172, provided:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such

certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided.

6. Statement of Congressman Rees on October 4, 1940 (86 Cong. Rec. 13247) on the proposed Section 503 of the Nationality Act of 1940:

Mr. Jenkins of Ohio. What do you mean by "nationals"?

Mr. Rees of Kansas. They are persons who owe allegiance to the Government of the United States. We say that if those persons attempt to come back, if they are turned down by the diplomatic representatives of our country abroad, if they still are able to give a substantial reason why they should be admitted as citizens of the United States, and if the Department of State believes there is a substantial reason for doing so, that person may come to this country for the purpose of bringing an action in court and being heard in this court and having his case appealed if he wants to. At the same time it is with the understanding that if he is turned down he shall be deported from this country.

We have a rather new situation here, and that is we are cutting off the claim to citizenship of these thousands of persons under this provision in the

bill who do not comply with its terms and therefore it was deemed advisable that some chance be given them to have what might be called their day in court. We have safeguarded the situation extremely carefully and feel that so far as possible we have prevented any abuse of it. It was my contention when this measure was up for consideration in the committee that such people did have the right to go into court either on a declaratory judgment or under a writ of habeas corpus, but there was a feeling on the part of others that they may not have that right.

We are giving this right not to aliens, if you please, but to American citizens. There being perhaps some foundation for that contention, we have allowed it but have safeguarded it just as carefully as we could. Have I made myself clear to the gentleman from Ohio?